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NATAL LAW REPORTS.

C

SUPREME COURT.

NEW SERIES.—VOLUME XIII., 1892.

BY

W. BROOME,

ADVOCATE.

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NATAL:

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SUPREME COURT OF NATAL

- The Honourable SIR MICHAEL HENRY GALLWEY, K.C.M.G., Chief Justice.
- The Honourable SIR WALTER THOMAS WRAGG, Knight, First Puisne Judge.
- The Honourable John William Turnbull, Second Puisne Judge.
- The Honourable William Boase Morcom, Q.C., Attorney General.

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NATAL LAW REPORTS

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JANUARY, 1892.

THE CORPORATION OF PIETERMARITZBURG (Appellants) v. EDWARD OWEN (Respondent).

January 8.

P.M.Burg

Valuation of immovable Corporation v. Municipal Corporation. Rates.property.

The valuation of rateable property within a Borough, required to be made by the Town Council, in terms of sec. 107, Law 19, 1872, for the purposes of assessment, is a valuation, by competent valuers, of the actual freehold value, at the time, of such property. assessment should not be disturbed by a valuation, made on behalf of the owner, wholly on the basis of the annual rental derived from the property.

[Per Wragg, J., dissentiente:—The Magistrate, hearing an appeal from the Borough valuation, acted reasonably in adopting the basis of the capitalised annual rental, for the purpose of ascertaining the freehold value of the property.

(In banco).

This was a review of the decision of the Magistrate of Pietermaritzburg, in an appeal from the assessment of the respondent's property on the Borough valuation roll.

The Magistrate, having taken evidence to show the amount of the annual rental derived from the property, adopted the capitalised value of such rental for the purposes of the assessment, and reduced the valuation from £1,450 to £1,050.

. The Corporation appealed.

January 8.

P.M. Burg
Corporation v.
Owen.

Greene, for appellants: The valuation contemplated by Law 19, 1872, sec. 107, for the purposes of a general rate and by Law 47, 1884, sec. 1, for a water rate, is that of the freehold value, and expressly so under the latter enactment. It has been the custom to ascertain the actual freehold value by means of competent and independent valuers. The test of the annual rental is not applicable to the case of an unfinished building not fit for occupation, although such a building is liable to be rated (Lamport v. Corporation of Durban, 3 N.L.R., July 14). The value of the rental would be misleading, if applied to premises which had been let on a long lease, continuing during great fluctuations in the property market, or to the case of a valuable site with a cheap tenement erected thereon and let at a low rental.

Tainton, for the respondent: The annual rental is a fair basis of valuation, and has been adopted in England for the assessment of the Poor Rate. The Magistrate's estimate was not disturbed upon appeal in The Corporation of P. M. Burg v. Griffin (5 N.L.R., 337). [He also cited The London and S. A. Land and Exploration Co., Ltd., v. The Kimberley Town Council, 2 H.C. of Griq. Reports, 331].

GALLWEY, C.J.: The Municipal Corporations Law, 1872 (sec. 106 and 167), provides for a valuation to be made for the purpose of assessing Borough rates. For many years this valuation has been that of the freehold value, and the entire question now to be decided is—How is this value to be ascertained? It is not disputed that the "freehold value" means the actual value of the property, no matter how it may be arrived at. Here, the value has been ascertained by the Corporation, not on the basis of the rental, but having regard solely to the present actual value of the premises, as determined by competent and experienced valuers. If we say that this was a wrong way of fixing the assessment, we disturb the practice of many years past. To adopt the principle relied on by the Magistrate might be to prejudice a large class of ratepayers. If the rental is to be taken as the test, let it be so, but the system should at least be uniform, and I am of opinion that the mode of assessment adopted by the Corporation is a fair and proper one.

WRAGG, J.: I understand that my brethren have agreed to set aside the Magistrate's decision. It is not, therefore, necessary that I should say more than that the reasons given by the Magistrate, in support of that decision,

commend themselves to my mind, and I would affirm the judgment.

January 8.

P.M.Burg

TURNBULL, J.: I am of opinion that the valuation Corporation v. effected by the Borough valuators should be sustained. However convenient it might be to alter the existing mode of assessment, any such alteration should be general, so as to give everyone a fair start. I do not see why speculators, proprietors of untenanted or under-let premises, and absentees, whose property may produce little or no present income, should not bear their share of municipal burdens.

Per curiam: The Magistrate's judgment set aside, without costs.

> [Applicants' Attorney: E. M. GREENE. Respondent's Attorney: J. W. TAINTON.]

In re THE MARRIAGE CONTRACT OF GEORGE FORD AND ADELAIDE WESTHEAD ARCHBELL LAWTON.

1891. October 27. 1892. January 11.

Husband and Wife. Antenuptial settlement. Income of In re Ford. property settled on wife. New Trustee.

On application by a husband for authority to use the income of property settled by him in trust for his wife during her life, the disposal of the income not being specially provided for in the settlement, HELD: That the wife. being inferentially entitled to such income during her life-time, could herself authorise her husband to receive the same, and that the application was therefore unnessary.

Where it appeared that the trustee of a marriage settlement, not having in any way administered the trust, desired to relinquish the same, the Court authorised the appointment, as trustee in his place, of some fit and proper person, subject to the Master's approval.

(In banco).

This was an application by the husband for leave to alter a marriage settlement.

1891. October 27. 1892. January 11. In re Ford. Certain landed property had been settled by the husband, under antenuptial contract, upon a trustee for the wife. The trustee, however, did not take transfer of, nor did he in any way administer, the property, which appeared to have remained under the control of the husband, who had erected valuable buildings on the land, and had received and used the rents accruing therefrom.

It was now asked (1) That the husband should continue during his life time to use the income of the trust estate, subject to provision as to forfeiture in case of insolvency, &c. (2) That the Trustee should have power, with the husband's consent, to sell or alienate the property, and to invest the proceeds on behalf of the trust. (3) That the trustee should be empowered, after the death of the spouses, or in their lifetime with their consent, to apply part of any child's share to his or her education or advancement in life.

It was also sought to relieve the trustee of his office, and to appoint some fit person in his place, to whom the property could be transferred.

Four minor children, maintained by their father, were concerned. The wife and the trustee concurred in the application.

The Master reported in favour of the first, but was opposed to the second proposal, and considered the third application to be unnecessary at the present time.

Hathorn, for applicant, pointed out that the settlement was silent as to the application of the income from the trust property.

WRAGG, J.: The natural inference is that the wife is entitled to the income.

GALLWEY, C.J.: I suppose the settlement includes the income. Could not the matter be arranged by authorising Mrs. Ford to hand the income to her husband?

WRAGG, J.: Let the wife receive the income and do what she likes with it.

GALLWEY, C.J.: The only part of the application that we can grant is that relating to the appointment of some fit and proper trustee, and the transfer to him of the trust property. The application regarding the disposal of the income is in my view quite unnecessary, as Mrs. Ford is entitled under the settlement to the income, and she can give a power of attorney to her husband, or to any other

person, to receive it. But I do not see how we can authorise any diversion of the income after the death of the wife. (Milne's estate, 1 N.L.R., 89).

1891. October 27. 1892. January 11.

In re Ford.

TURNBULL, J., concurred.

Per curiam: Appointment authorised of some fit and proper person or persons to be approved by the Master, as trustee or trustees of the marriage settlement, in place of the present trustee.

[Applicant's Attorneys: HATHORN & MASON.]

In re MAHOMET EBRAHIM GOORAH.

1892. January 11.

Insolvency. Debtor's petition. Absence of assets. In re Goorah.

Debtor's petition refused by the Court, on the ground of the absence of assets.

(In banco).

Pitcher presented the petition of the above-named debtor, whose schedule showed unsecured liabilities, £143 12s. 9d. and no assets. The insolvent, who had been a store-keeper, stated on oath that the holder of a bond over his stock-intrade, had taken possession, and that he was being pressed by other creditors.

Per curiam: The application refused.

[Applicant's Attorney: W. E. PITCHER.]

1892. January 11.

In re THOMAS MAWSON.

In re Mawson Insolvency. Liabilities shown in debtors petition. imposed by Magistrate and unpaid.

> Further hearing of debtor's petition ordered (GALLWEY, C.J., dissentiente) to stand over, for evidence of payment of a fine imposed in a Magistrate's Court, or for satisfactory evidence as to default in payment, such fine being included in the schedule of unsecured liabilities.

(In banco).

Pitcher presented the petition of the above-named debtor.

WRAGG, J., noticed that the schedule of unsecured liabilities included an item of £20, being the amount of a fine imposed by the Magistrate of Newcastle upon the debtor for a contravention of the safe mining regulations issued under the Mines Law, 1888. His Lordship observed that the matter had come before him in November last, when the sentence had been submitted to him for confirmation. Under these circumstances, His Lordship was of opinion that the surrender should not be accepted until it were shown that the fine had been paid or until the Court had satisfactory information as to the default in payment.

TURNBULL, J., concurred.

GALLWEY, C.J., thought that the surrender should be There was no obligation on the Court to collect fines imposed by a Magistrate.

Per curiam: To stand sine die.

[Applicant's Attorney: W. E. PITCHER.]

JOHANNES VOS (Plaintiff) v. THE COLONIAL GOVERNMENT $_{\text{Januar}}^{18}$ (Defendant). [The Defendant Applicant.] $_{\text{Vos.}}^{0.0}$

January 11.
Vos v. Colonial
Government,

- Pleading. Settlement of issues. Jury Trial. Practice (Law 10, 1871, secs. 30, 39, 41; Rules of Court of 31st Jan., 1860, Nos. 3 and 4).
- Plaintiff's declaration claimed a perpetual injunction to restrain the Government from proceeding with certain waterworks on his property.
- The plea questioned plaintiff's title, and averred that the conditions of the grant from the Crown justified the action of the Government upon the property. It was also pleaded that what was done had been done with plaintiff's leave, and that no injury had been occasioned.

The case was set down for trial before a jury.

HELD, on an application by defendants, for an order under sec. 3 of the Rules of Court of Jan. 31, 1860, specifying the issues between the parties (WRAGG, J., preferring to express no opinion, on the ground that he was the Judge who would hear the case with the jury), that the issues were such as could properly be put to the jury by the judge presiding at the trial, and that the application should therefore be refused, without prejudice to the discretion of the presiding judge.

(In banco).

Morcom, A.G., for defendants, moved for an order under Rule 3 of 31st January, 1860, specifying the issues of fact and of law to be tried between the above-named parties. The declaration as originally filed included a claim for damages, which, however, had been disallowed by the Court upon the defendants' exceptions (vide 12 N.L.R., 337). He contended that the essential issue to be decided was whether or not the defendants should be interdicted, and that this was an issue, not of fact, but of law. The case of Corpora-

January 11.

tion of P.M.Burg v. McEwan (6 N.L.R., 209 and 221) decided that the jury were entitled to return a general verdict Your Colonial upon questions of fact left to them by the presiding Judge; but they could not properly give such a verdict upon the question whether or not the plaintiff was entitled to an interdict, which was an issue of law not proper for the consideration of a jury (Law 10, 1871, sec. 30).

> Mason, for plaintiff, argued that the Rules of the 31st January, 1860, were not intended to deprive plaintiff of his right under the Jury Law to a general verdict. The pleadings contained a clear and sufficient statement of the issues involved, and an order of Court specifying those issues was, therefore, unnecessary.

> GALLWEY, C.J.: The difficulty in this application arises from the provision in the Jury Law (sec. 39) requiring a verdict to be obtained from the jury by the Registrar in a particular way. Had the claim for damages remained, the question would probably not have been raised, but the remedy now asked for—that of a perpetual injunction—is a legal one, involving the question of title or possession. I am inclined to say that the issues in this case can be better put in half-a-dozen questions referred by the Judge to the jury, at the trial, after the evidence has been heard.

> WRAGG, J.: I prefer to make no remark, as I am the Judge who will hear the case with the jury.

> TURNBULL, J.: I think Law 10, 1871, is quite clear, and that we can continue our present practice until the Legislature makes other provision. However desirable it may be, we cannot be bound by the English law and usage when our own law fully meets the case (Law 10, 1871, sec. 49).

> Order:—The application refused, without prejudice to the discretion of the presiding Judge. Costs to be costs in the cause.

> > [Applicant's Attorney: R. F. Morcom. Respondents' Attorney: HARRY ESCOMBE.]

In re The Testate Estate OF OLIVER TENNANT.

1891. September 25. 1892. January 11.

Executor. Testate estate. Sale of land not authorised by

In re Tennant

Refusal by the Court of an application for confirmation of sale of land by the executrix of a will, such sale being contrary to the express terms of the will.

(In banco.)

This was an application by Margaret Tennant, as an individual, and in her capacity of executrix testamentary, and guardian of the children of herself and her deceased husband, Oliver Tennant, for an order authorising and confirming the sale by her of certain immovable property belonging to the testator's estate.

The matter having been referred to the Master, that officer reported that the land had been sold by the executrix in July, 1890, by public auction, for £150, and that the proceeds appeared to have been invested by her in her business of store-keeper carried on in the Orange Free State.

The Master found that the applicant had no right to sell the property, she being co-heiress thereof with her seven children, the latter being entitled under the joint will of the spouses, to seven-eighths of the estate of the deceased, the applicant being maintained in possession until the majority of the youngest child.

The price given, £150, appeared to be a fair one, and the applicant offered security for the minor's shares.

Pitcher presented the Master's report, and moved for an order as above. He offered on behalf of the applicant to secure the minor's portions.

GALLWEY, C.J.: There has been a violation of the direct wishes of the testator.

WRAGG, J.: The purchase money seems to have disappeared.

GALLWEY, C.J.: You ask us to consider the position of the testator's estate, and, if we find that the sale is even slightly beneficial to the children, to set aside the will. Was there ever a Court that, in the face of the fact re1891.
September 25.
1892.

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In re Tennant

ported by the Master—that the will gives no power to sell grant such an application? Let the purchaser bring his action against the widow to enforce the sale. Generally speaking, it is for the benefit of children that landed property in a rising Colony should be kept intact.

TURNBULL, J., concurred.

Per curiam: Application refused.

[Applicant's Attorney: G. M. Burne.

1891. In re THE INTESTATE ESTATE OF ANNAH SUSANNAH
1892. DEBORAH POTGIETER.

January 11.

In rePotgieter Executor. Intestate Estate. Commission to executor. Landed property taken over at a valuation.

Executor's commission, charged in account at £37 10s., being 2½ per cent. on the land and 5 per cent. on movables, reduced, on the Master's recommendation, to £10 10s., the property not having been sold but taken over at a valuation.

(In banco).

Mason presented the Master's report on the first and final liquidation and distribution accounts filed by the executor dative of the above-named estate.

The matter had been before TURNBULL, J., in Chambers, and stood over for further hearing as to the valuation of assets and the executor's commission, the latter charged in the account at £37 being at the rate of 2½ per cent. on the land and 5 per cent. on movables.

The Master, in view of the fact that the property had not been sold, but had been taken over at a valuation, assessed the commission at £10 10s.

The Ladysmith agents of the executor represented that the latter had incurred heavy travelling expenses in connection with the case of Potgieter v. Potgieter (vide 12 1891. N.L.R., 88), in which the Court had ordered the estate to be administered ab intestato.

January 11.

In re Potgieter

GALLWEY, C.J.: The Master has a discretion in such matters. I am not disposed to alter his assessment.

Per curiam: Accounts confirmed, subject to disallowance of £26 10s. of the executor's commission, such amount to be paid to the Master.

[Applicant's Attorneys: Hathorn & Mason.]

In re Testate Estate of Francis Allerston.

1892. January 11. In re Alleraton

Guardian. Release of Guardian testamentary.

Guardian Testamentary released by the Court, upon election and confirmation of quardian dative in his place, it appearing to the Court that the ward had been adopted and was being suitably maintained by another person.

(In banco).

This was an application by Henry Bale, in his capacity of guardian testamentary of Eva Allerston, minor daughter of Francis Allerston, deceased, for leave to retire from the guardianship.

It appeared that the ward had been adopted, and was being suitably maintained and educated, by a person occupying a responsible position.

Greene moved on an affidavit setting forth the facts above indicated.

Per curiam: The Master authorised to call a meeting of next of kin of the deceased Francis Allerston, for the purpose of electing some fit and proper person or persons as guardian or guardians of the said minor. Upon such election being made and confirmed, the said Henry Bale to be released from the guardianship.

[Applicant's Attorney: R. FERGUSSON.]

1892. Jan. 11 & 12.

In re The Testate Estate of Caroline Brown.

In re Brown.

Executor. Tesate Estate. Extension of lease beyond date specified in will. Minor's interest.

The executors of a will were thereby authorised to let the immovable property for a term or terms not exceeding 21 years from the date of the will.

The majority of the Court, on being satisfied that the extension of an unexpired lease to a date beyond such stipulated term would be to the advantage of the minor heir, authorised such extension [Turnbull, J., dissentiente.]

(In banco).

This was a matter which had been referred from the Durban Circuit Court for the Master's report as to whether what was proposed would be for the benefit of the minor heir. The Master reported that the extension sought to be made would be beneficial to the minor.

The will of the testatrix authorised the executors to let the immovable property for a term or terms not exceeding 21 years from the date of the will. This period expired on the 2nd May, 1893. There was an existing lease up to that date upon terms advantageous to the estate. All the major heirs consented to the order asked for, namely, the extension of the lease until the majority of the minor child—the 27th August, 1895.

It appeared that under the will the executors were bound to realise the landed property of the estate on the death of the surviving spouse, which event took place in 1883. An order of Court, however, dated the 31st January, 1884, authorised the postponement of such sale "until further order."

Pitcher moved on affidavits and documents setting forth the facts recited above.

GALLWEY, C.J.: I am prepared to authorise an extension of the lease as prayed, without, however, saying anything as to the future administration of the estate. It appears that the extension of the lease will prove beneficial to the minor concerned.

TURNBULL, J.: I do not agree. The extension may be advantageous, but I hold that a judge has no more right to alter the express and clear terms of a will, than to alter an In re Brown. act of the Legislature.

Jan. 11 & 12.

WRAGG, J.: I am in favour of making the order asked for, that is, authorising an extension of the lease until the 27th August, 1895.

Per curiam: The extension of the lease authorised as prayed.

[Applicant's Attorney: W. E. Shepstone.]

In re THE INSOLVENT ESTATE OF WILLIAM EMIL HOLLARD. 1892. Jan. 11 & 12. Ordinance 24, In re Hollard. Release from sequestration. Insolvency. 1846, sec. 107.

Estate released from sequestration, the insolvent being out of the Colony and his estate having been surrendered in 1867, upon the Master's certificate that all proving creditors had either consented to the release or had had deposited for them the amount, with interest, of their respective claims.

HELD: That the Court is not required by sec. 107 of the Insolvency Law to make "further enquiry" concerning creditors who have not proved debts or entered claims. unless on the face of the application, the Master's certificate, or connected papers, there appear something which is not bona fide, or which is so suspicious as to justify such "further enquiry," the rights of such nonproving creditors being specially protected by sec. 107, and not being in any way altered or affected by the release of the estate from sequestration.

[Per Gallwey, C.J., dissentiente: That, under the circumstances, before granting the release, evidence should be produced to the Court showing that there were no other creditors in existence who had neither proved debts nor entered claims against the estate.]

(In banco).

Jan. 11 & 12.

Greene moved under section 107, Ordinance 24, 1846, for the release from sequestration of the estate of the above-In re Hollard. named insolvent. He read the Master's certificate required Ly law, to the effect that all creditors who had proved debts or entered claims against the estate had either testified in writing their consent to the release of the estate from sequestration, or had had deposited for them in his office the full amount, as well principal as interest, of their several claims. The third meeting of creditors took place on the 9th May, 1867, the estate having been surrendered on the 16th January of that year.

> Wragg, J.: My sympathies are with the applicant. would allow the motion and would release this estate from sequestration. I think that we ought always to favour such applications and thereby encourage insolvents, especially so long after the act of insolvency, to come forward and thus openly, after paying 20s. in the pound to all creditors who have proved debts or who have entered claims, to seek release from sequestration.

> My own view of the concluding portion of sec. 107, of Ordinance 24 of 1846, is that we, the Court, ought not to make such further enquiry concerning creditors who have not proved debts or entered claims, unless on the face of the application, the Master's certificate, or connected papers, there appear something which is not bond fide or which is so suspicious as to justify such further enquiry. It is to be observed that, by the said section, the rights of those creditors, who have neither proved nor entered claims, are specially protected and are not in any way altered or affected by the release of the estate from sequestration.

> TURNBULL, J.: I am of the same opinion. There does not appear to be any concealment on the part of the debtor.

> GALLWEY, C.J.: I dissent. In my opinion, the insolvency having occurred 25 years ago, and the insolvent being resident out of the Colony, it would be proper that the Court should make some enquiry in the interests of creditors, if any, who have not proved their claims. There should, at least, be forthcoming an affidavit by the insolvent that there are no creditors in existence who have neither proved debts nor claimed against the estate.

Per curiam: Release granted.

[Applicant's Attorneys: GREENE & CARMICHAEL.]

THE CLERK OF THE PEACE, P.M.BURG (Appellant), v. J. A. PETERS AND WILLIAM LAWRENCE (Respondents).

1892. January 12.

Clerk of the Peacev. Peters and Lawrence

- Liquor, sale of, to native. Law 22, 1878, sec. 2, and Law 10, 1890, secs. 1, 2, and 5. Magistrate's Court. Form of summons.
- A summons in a Magistrate's Court charged a licensed dealer and his barman with contravening the provisions of sec. 2 of Law 22, 1878, in that they, or one or other of them, did wrongfully and unlawfully sell, barter, or supply, or cause to be sold, &c., to a certain native (named), a certain bottle of rum or other spirituous or fermented liquor of an intoxicating nature.
- HELD (TURNBULL, J., dissentiente): That the summons was good, it being sufficient to cite therein the 2nd section of Law 22, 1878, creating the offence, without also referring to section 2. Law 10, 1890, in which the punishment was specified, the two Laws, by section 5 of the later enactment, having to be read and construed together as one Law.
- [Per Turnbull, J.: That the section of the Law imposing the penalty should be specified in the summons, as well as that creating the offence.]

(In banco).

This was a review of the judgment of the Magistrate of the Umgeni Division, pronounced on the 16th December, 1891, in a case wherein the respondents were charged with contravening the provisions of section 2 of Law 22, 1878, and wherein the Magistrate dismissed the summons upon an exception taken by the respondents.

The form of the summons is indicated in the head-note. The exception was as follows:—"For that whereas the crime or offence charged had a particular punishment prescribed therefor by statute, to wit Law 10, 1890, the said statute is not referred to in said indictment or plaint."

The grounds of review were in effect that the Magistrate's dismissal of the summons was contrary to Law.

1892. January 12. Clerk of the

Morcom, A.G., for appellant: The summons was sufficient in Law, the form being that used in The Clerk of the Peace v. Peters (not reported—27th November, 1883). In Reg. v. Peacev. Peters Tod & Pilkington (not reported—16th Murch, 1891), the same exception was taken and upheld, but there is a distinction between the law creating an offence and the law fixing the penalty—the latter need not be set out in the summons. In the present case, the defendant was charged with contravening sec. 2, Law 22, 1878, which creates the The 3rd section of the same law provided the penalty, until the enactment of Law 10, 1890, which now fixes the penalty though it does not declare the offence. [He cited Town Clerk, Durban v. Pemberton, 12 N.L.R., 344.]

> Greene, for respondents: The Magistrate rightly upheld the exception, being bound by the decision in Reg. v. Pilkington & Tod (vide supra). Our Rules of Court adopt the practice of the Cape Supreme Court. The 16th Rule (Cape) requires the statute to be referred to. In England, prior to 14 and 15 Vic., c. 100, sec. 24, it was necessary to set out in the indictment a statute fixing or altering a penalty. (Reg. v. Ratcliffe, Moodie's C.C., 68) and the procedure at the Cape was in conformity with this rule. [Wragg, J.: As to the recent decision in the case of Reg. v. Pilkington & Tod (vide suprà), I have acted differently for years, since 1883. You cannot ask two Judges to change their opinion and practice because a third Judge has recently adopted a different view. Have you noticed that Law 10, 1890, and Law 22 of 1878, are to be read and construed as one Law?] The offence charged is not a common law offence. [He also cited King v. Commandant of Volunteers, 7 N.L.R., 130.]

> Morcom, A.G., in reply, referred to Law 16, 1861, as to what need not be included in an indictment.

> GALLWEY, C.J.: In this case, the respondents were charged before the Magistrate of the Umgeni Division with contravening a certain Law—No. 22, 1878, sec. 2. The offence is sufficiently set out in the summons, which states the facts amounting to a contravention of the law referred to. It is, however, contended that the 2nd section of Law 10, 1890, should also have been set out. But section 5 of the latter law quite cures this, by incorporating the two laws, which have to be read and construed together. This is, I think, fatal to the arguments advanced on behalf of the respondents. The case must be remitted to the Magistrate for trial, with a direction that the offence is sufficiently set forth in the summons.

The case of Reg. v. Pilkington & Tod (vide supra) has been referred to, but that is easily distinguishable from this case. I, however, decline to say anything which may have Clerk of the the effect of re-opening the case of those persons, although and Lawrence I myself would not have taken the view adopted by the presiding Judge.

1892. January 12.

WRAGG, J.: The summons quotes the law by which the offence was created, and the subsequent Law, 10 of 1890, is to be read with that law. In my opinion, the summons contained sufficient notice to defendants of the offence with which they were charged.

The case of Reg. v. Pilkington & Tod (vide supra) is quite different. Rape is an offence at common law and, in my opinion, it is not necessary that an indictment should set forth the section of the law fixing, but not increasing, the penalty for such offence. I have accepted, as good, numerous indictments of that nature.

TURNBULL, J.: I will not refer to the case of Reg. v. Pilkington & Tod (vide suprà), as my learned brethren differed with me in that case. There, however, appears to me to be some force in Mr. Greene's objection. If the two laws in question are to be read and construed together as one law, that does not, in my opinion, remove the necessity for setting forth in the summons the section declaring the penalty as well as that creating the offence.

Per curiam: The case remitted to the Magistrate for trial, with a direction that the offence with which the respondents are charged is sufficiently set forth in the summons and plaint in the Court below.

[Appellant's Attorney: R. F. Morcom.

Respondents' Attorneys: GREENE & CARMICHAEL.]

Jan. 12 & 13.
Laugston v.
Goodwill.

EDMUND HOWARD LANGSTON (Appellant) v. JONATHAN WHITTAKER GOODWILL (Respondent).

- Principal and agent. Money entrusted for speculation in shares. Mutual reticence and mora. Bona fides of principal.
- G. entrusted to L., a member of a firm of brokers, a sum of £40 for speculation in the share market. L. purchased shares in the D. Company, but did not duly acquaint G. with what he had done, neither did the latter ask for information on that point. The shares became worthless, and G. sued L. for £40, claiming that no scrip had been handed to him, although frequently demanded. The Magistrate gave judgment for £17, the value of the shares at a time when he considered that plaintiff should have been informed of the fact of the shares having been purchased for him.

HELD, on appeal, inasmuch as the evidence showed that there had been a mutual reticence, amounting to more, on both sides, and especially as L. appeared to have acted in good faith, dealing with the shares as though they had been his own, there being no obligation upon him to realise the shares—that the Magistrate's judgment was wrong and should be turned into a judgment for defendant.

(In banco).

This was a review of the judgment pronounced by the Magistrate of the City Division on the 3rd December, 1891, in a case wherein the respondent claimed £40 with interest, being the amount of money handed by plaintiff to defendant on the 21st and 23rd August, 1889, for the purchase of scrip on plaintiff's behalf, but which he failed to do, or to hand any scrip to the plaintiff, notwithstanding frequent demands.

It appeared from the evidence (which, however, was somewhat conflicting), that the plaintiff had instructed defendant to purchase shares in the Village Main Reef Company, but the evidence went to show that this was a separate transaction, and that the investment of the £40 was discre-

tionary with defendant. The plaintiff, however, apparently relied on these instructions and on an intimation that "Villages" had been bought for him. These shares were Langston r. still of value.

Jan. 12 & 13. Goodwill.

It was shown that the defendant had in October, 1889, bought a parcel of 200 "Du Preez" shares at 10s. 6d.—75 of which he held on account of the plaintiff, thus dealing with £39 7s. 6d. out of the £40 received by him from the latter. Defendant admitted that he "took no particular trouble" to acquaint plaintiff with what he had done, even when he was in Maritzburg in January, 1890, nor did he write to him. On the other hand, the plaintiff appeared to have been silent between October and December, 1889. In January, 1890, defendant left the Colony, returning in July, 1890. Between October 1889 and March 1890 Du Preez shares had fallen from 10s.-11s. to a nominal sum, and were now of no value.

There was a tender of 12s. 6d. and 75 Du Preez shares, which defendant did not accept.

The Magistrate found that in January, 1890, when defendant ought to have informed plaintiff of what he had done, Du Preez shares could have been sold for 5s, each, and he therefore gave judgment for £17, on the ground that the opportunity of realising that sum had been denied to plaintiff owing to the delay of defendant, amounting to a culpable mora, in giving him information which he ought to have given.

The defendant appealed, on the grounds (1) That damages had been given, although not claimed in the summons (2) That damages alleged to have resulted from defendant's silence were not legally claimable (3) That there was no breach of contract (4) That plaintiff by his silence acquiesced in defendant's dealings (5) That defendant acted bond fide and to the best of his ability (6) Tender of the scrip on demand.

Hathorn, for appellant, referred to the facts, argued that there had been mora on both sides, and cited Adler v. De Waal (5 N.L.R., 251).

Laughton, for respondent, contended that the defendant was a trustee and had unjustly omitted to inform plaintiff of the investment made. The Magistrate, with the witnesses before him, had found on the facts.

GALLWEY, C.J.: This action is for the sum of £40 entrusted by plaintiff to defendant for the purchase of shares. Jan. 12 & 13.
Langston v.
Goodwill.

The Magistrate based his judgment on the following statement of the case—"The plaintiff in this case sued for the amount handed by him to the defendant to be employed in the purchase of shares in a certain Company, and alleged that the money had been employed in the purchase of shares in another Company, which was now practically insolvent." This statement, however, is not borne out by It appears that there was some talk of the evidence. "Village" shares, but it is not a fair deduction to say that the plaintiff had reason to think that the shares to be bought with his money were "Village" shares. I agree with the Magistrate that the market prices of "Villages" prevented the defendant from purchasing 75—the number mentioned—for the sum entrusted to him. This was obviously impossible. It is plain that the shares actually purchased with the £40 were those of the Du Preez Company, and they were bought bond fide as a speculation, which was the object for which the plaintiff gave his money. It is to be regretted, however, that there was a reticence on both sidesthe plaintiff did not ask for information and the defendant did not give any information as to what was being done with the money. [His Lordship then referred to the evidence]. The first time that there was any intention of realising the shares was in January, 1891, until when the plaintiff allowed the shares to remain in the hands of the defendant. The Magistrate has found—and I agree with him—that on the 28th January, 1891, the plaintiff knew that 75 "Village Reef" shares had not been and could not have been bought for £40. In the demand which followed no claim for damages was made. I have come to the conclusion that the defendant acted with perfect good faith and that he duly performed the duty which he was instructed to perform, dealing with the plaintiff's shares in the same way as he dealt with his own shares in the same Company. There was no obligation upon him to realise the shares, nor was it incumbent on him to inform the plaintiff that he had not The defendant is therefore not liable in damages for the omission complained of, and there is nothing to show that if the plaintiff had had the shares in January, 1890, he would have sold them. On these grounds I am of opinion that the Magistrate was wrong in giving to the plaintiff £17, and I think that his judgment should be set aside.

WRAGG, J: I am of opinion that our judgment should be for the defendant on two grounds:—(1) That he committed no breach of the contract under which he received the plaintiff's money for investment, and (2) That he used

therein such diligence as was reasonable in all the circumstances and such as he applied to his own investments at that period of speculation in gold shares.

1892. Jan. 12 & 13. Langston v. Goodwill.

The Magistrate's decision should be reversed, and judgment should be entered for defendant with costs of this appeal and in the Court below.

TURNBULL, J.: The evidence satisfies me that the defendant bought 75 Du Preez shares with the money placed in his hands by the plaintiff. There appears afterwards to have been mora on both sides. I cannot understand—unless, indeed, the wish suggested the thought—how plaintiff could have imagined that Village Main Reef shares had been bought for him. I am in favour of setting aside the Magistrate's judgment and turning it into a judgment for the defendant.

Per curiam: The Magistrate's judgment turned into a judgment for the defendant, with the costs of this review and of the Court below.

[Appellant's Attorneys: Hathorn & Mason. Respondent's Attorneys: Laughton & Tatham].

HORACE CHARLES DOWNES (Appellant) v. THE CLERK OF THE PEACE, ALFRED COUNTY (Respondent).

1892. January 13.

Downes v.
Clerk of the

Liquor—supply of, to native, &c. (Law 22, 1878). "Hotten-Peace.
tots and Griquas" (Law 14, 1888). Person of mixed
descent known as a "Bastard Hottentot."

A coloured person, described as a "Bastard Hottentot," whose parents and grand-parents were both of mixed race, but one of whose great-grand-parents on either side was believed to have been Dutch, and who stated that he "had joined Adam Kok and become a Griqua," HELD, to be neither a "Hottentot" nor a "Griqua," nor to come within the definition of a "Native" given in Law 14, 1888, sec. 1, in respect of an alleged contravention of Law 22, 1878, prohibiting the sale of spirits, &c., to persons of the Native race,

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Downes v.
Clerk of the Peace.

[Per Gallwey, C.J. (dissentiente): The person in question came within the terms "Hottentot" and "Griqua" in Law 14, 1888, sec. 1.]

(In banco).

This was a review of the judgment of the Magistrate of Alfred County given on the 3rd December, 1891, in a case wherein the appellant was charged with contravening sec. 2 of the Law 22, 1878, in selling to a certain "hastard Hottentot" a bottle of brandy. The Magistrate held that any so-called Griqua or Hottentot, who failed to show that his father was a European, came within the provisions of Law 22, 1878. He also was of opinion that under sec. 3, Law 14, 1888, the burden of proof in the present case lay upon the person supplying the liquor to show that the man to whom the liquor had been supplied was not a "Native."

The appellant was convicted and sentenced to pay a fine of 20s., and he appealed on the following grounds:—(1) That Laws 22, 1878, and 14, 1888, did not apply to "bastard" Hottentots. (2) That the Magistrate wrongly placed the onus of proof on defendant. (3) That he had wrongly found that the person in question was a Griqua by adoption. (4) That the Magistrate wrongly held that any Griqua or Hottentot who failed to show that his father was a white man came within Law 22, 1878; and (5) That the person in question was neither a Native, nor a Griqua, nor a Hottentot, within Laws 22, 1878, and 14 of 1888.

Laughton, for appellant: Section 3, Law 14, 1888, fixing the burden of proof, only applies when the alleged native has himself been summoned in civil or criminal proceedings. The person in question is neither a Native, nor a Griqua, nor a Hottentot. Penal laws must be construed strictly.

Morcom, A.G., for respondent: The term "bastard" is vituperative only, and is applied to descendants of Hottentot women by Dutchmen. It is a rule of law that if there is a lawful marriage, the issue takes the status of the father, but if no marriage, that of the mother. [Gallwey, C.J.: That doctrine has been rather doubted of late.] The person in question has undoubtedly been absorbed into the Griqua tribe, and for purposes of national recognition, he became a Griqua. He is, however, in fact, a Hottentot. However he may be regarded, the conviction should stand. [Gallwey, C.J.: The Magistrate fined the appellant 20s., while the minimum penalty under Law 10, 1890, is £5.] [WRAGG,

J.: The sentence is bad on that account.] Your Lordships may increase the sentence (Law 22, 1889, sec. 46), though I will not press for that.

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Laughton, in reply.

GALLWEY, C.J.: Hottentots or Griquas may not be supplied with liquor. What is the difference between a Hottentot and a Bastard Hottentot?

WRAGG, J.: It is hard to thrust these people back to the level of the lowest of their parents or ancestors.

TURNBULL, J.: A "bastard," i.e., not genuine Hottentot, I have always understood to be a cross between a Hottentot and a white person. I am inclined to set aside the Magistrate's judgment.

WRAGG, J.: The case is not free from difficulty, but the matter is a penal one, and we ought not to lean against the defendant. I am not myself satisfied that the man, to whom the liquor was supplied, and who is described in the summons as a bastard Hottentot, is a Hottentot within the meaning of Law 14, 1888, the terms whereof we ought not to extend.

The Magistrate was also wrong in imposing a penalty not sanctioned by the law; he was bound, in case of conviction, to impose a fine of not less than £5, whereas he has fined the defendant £1 only.

The decision of the Magistrate should be set aside.

TURNBULL, J.: I agree. The man is, to my mind, neither a Hottentot nor a Griqua. The framers of the law should have said from how far back the mixed descent was to be reckoned, whether for two, three, or more generations, if they wished to include persons of mixed descent. The judgment should be set aside.

GALLWEY, C.J.: In my opinion, this man is one of the persons prohibited by Law 22, 1878, amended by Law 14, 1888, from obtaining intoxicating liquor. I do not see that the use of the term "bastard," a definition more of paternity than of race, should affect the question. A bastard Hottentot is a Hottentot for the purposes of Law 14, 1888, and the person in question would also appear, as a Griqua, to be liable to the provisions of Law 22, 1878, if not actually to fall within the description of a member of an aboriginal

January 13.

Downes v.
Clerk of the Peace.

tribe south of the Equator. I agree, however, that the fine imposed by the Magistrate was not in accordance with the statute law, and on that ground the conviction cannot stand.

Per curiam: Conviction quashed.

[Appellant's Attorneys: LAUGHTON & TATHAM.]

1892. January 16.

In re THE TESTATE ESTATE OF HANNAH TULL.

In re Tull.

Executor and Trustee. Testate estate. Foreign executors testamentary and trustees of will proved in Natal authorised to consent to transfer of landed property in this Colony.

(In banco).

This was an application for an order authorising the Registrar of Deeds to recognise a consent signed by the executors of the above estate, to the sale of certain landed property in Natal.

The question submitted to the Court was as to the power in regard to property in Natal of the executors and trustees residing in England of the testator's will, executed in England and proved in that country and in Natal. Two of the three executors and trustees survived, and consented to the proposed transfer.

Mason, for applicants.

GALLWEY, C.J.: I look upon these persons as trustees in Natal. I hope, however, that the Registrar of Deeds will not transfer property subject to a mortgage upon a consent. There may be an order similar to that in Harford's case (12 N.L.R., 368). [His Lordship referred to Stewart v. Norton, 14 M.P.C., 17.]

Per curiam: The remaining executors and trustees authorised to consent to the transfer of the property in question, free of the mortgage thereon, as prayed.

[Applicant's Attorneys: HATHORN & MASON.]

In re The Intestate Estate of Richard John Vosper.

1892. January 16.

Executor. Intestate Estate. Release.

In re Vosper.

Release of co-executrix dative about to leave the Colony, upon consent of her sureties. And upon their agreeing to rontinue their liability, the co-executor dative authorised to act as sole executor.

(In banco).

This was an application by the widow and co-executrix dative of Bichard John Vosper for an order releasing her from her executorship and appointing her co-executor to act alone, as she was about to leave Natal.

Mason, for applicant.

Per curian: Upon the consent of the sureties to the executor's bond, and upon their agreeing to continue their liability under the said bond, the executrix released from the executorship and the co-executor authorised to act as sole executor dative of the estate.

[Applicant's Attorneys: GREENE & CARMICHAEL.]

In re The Testate Estate of Thomas Wyatt Minter.

1892. January 18.

Guardian of Minors. Leave to defend action.

In re Minter.

Guardians dative authorised by the Court (TURNBULL, J., dissentiente) to defend an action instituted against them in their capacity of executors testamentary, in a foreign Court, by the testator's surviving spouse, for a sum of money claimed in terms of antenuptial contract. Questions as to personal liability of defendants, however, reserved.

(In banco).

This was an application by the executors testamentary of Thomas Wyatt Minter, in their capacity of guardians dative of his minor children, for an order authorising them to defend an action instituted against them, as such execuJanuary 18.

In rc Minter.

tors, by Maria Margaretha Scheiffer (formerly Minter) in the High Court of the South African Republic, for payment of £500 claimed under her antenuptial contract with the deceased.

Bale, for applicants: It is a new but a very proper practice to seek the authority of the Court in a matter such as this. Such an application was favoured by the law of Holland (Prince q.q. Deleman v. Berange alias Anderson, 1 Menz., 435; De Blanche v. Zietsman, 1 N.L.R., 185; Grotius (Maasdorp), 1.9.7 & 8.) It is true that the guardians dative were appointed by the Court here, while the action has been instituted in the South African Republic, but it is part of the comity of nations that the guardians should be recognised everywhere except where other legal provision has been made (Barr's Intern. Law (Gillespie), 431; Voet, 26.7.12).

GALLWEY, C.J.: Here are two claims—one against the estate and another, in regard to payment of costs, against the executors in their private capacity. There may be good grounds of defence, but the latter is an exceptional claim, the reason for which does not appear. I do not, however, say that an application would not be properly made to this Court after judgment as regards the costs. There is no objection that I can see to an order entitling you to defend the claim against the estate.

WRAGG, J.: I think that we should make an order giving leave to the executors to defend the action in the Transvaal Court, with permission to apply again, if necessary, to this Court as to the costs of those proceedings.

TURNBULL, J.: We should, in my opinion, make no order. I know of no instance of an executor testamentary acting bond fide in his duty, being cast in costs. The applicants might with advantage take Counsel's opinion in the foreign country where the action is brought, but I do not see any reason for them to come to this Court at present.

Per curiam: The applicants authorised to defend the action as prayed, all questions as to the personal liability of the applicants being reserved.

[Applicant's Attorneys: ANDERSON & WATT.]

MARTINUS PETRUS RADEMAN (Appellant) v. AUBYN FRANCIS MARGARY AND ANNIE CHARLOTTE RICHARDS (Respondents).

Jan. 19 & 21.

Rademan r.

Margary and
Richards.

- Review. Magistrate's judgment set aside on the evidence.

 Dogs. Liability of owners of for sheep destroyed.
- Where it appeared to the Court that a Magistrate had given judgment on mistaken inferences from the evidence, the judgment set aside.
- [Per Gallwey, C.J.: The case of "the Glannibanta," 1 Prob. Div. 283, considered and followed].
- For damage done by two dogs worrying sheep at the same time, the owner of each held to be liable for one half of the injury.

(In banco).

This was an appeal from the judgment of the Magistrate of Newcastle, pronounced on the 17th November, 1891, in a case in which appellant was plaintiff, and claimed from the respondents (defendants) £47, in respect of sheep destroyed or worried by dogs belonging to the respondents. The Magistrate, after hearing very lengthy evidence, gave judgment for the respondents, with costs.

Bale, for appellant, referred to the fact that one of the dogs had not been produced in the Court below, and contended that the defendant Margary was liable thereby to the strongest presumption against him as to the destructive capacity of the animal (Armory v. Delamirie, I Strange, 504, and Smith's L.C., 5th Ed., p. 301, eiting also Braithwaite v. Coleman, I Harrison, 223). He urged that it was not necessary to prove scienter, on the part of the defendants, of the dog's disposition. Each owner is liable for one-half of the damage done by the two dogs together (Le Roux and others v. Fick, Buch. Rep., 1879, p. 29; Drummond v. Searle, ibid., 8: Law 27, 1875, sec. 6). He referred at length to the evidence to show that the Magistrate had come to a wrong conclusion.

Vanderplank, for respondent Margary.

Pitcher, for respondent Richards.

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Margary and
Richards.

GALLWEY, C.J.: This appeal has been brought against the judgment of the Magistrate of Newcastle, on the main ground that such judgment is contrary to the evidence. There has been some controversy as to how far a Court of Appeal is bound by the finding of a lower Court on matters of evidence. I have looked into the question, and I find a distinction between an application for a new trial, on such grounds, of a case heard before a jury, and an appeal from the finding of a Judge or Magistrate in a lower Court. cite the following passage from the judgment of Sir R. Baggallay in the case of "The Glannibanta" (approved of in Bigsby v. Dickinson, 4 Chan. Div., 24) 1 Prob. Div., 283):—"Great weight is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are . . material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect. In the present case it does not appear from the judgment, nor is there any reason to suppose, that the learned judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary, it appeared that his judgment in fact proceeded upon the inferences which he drew from the evidence before him."

In Le Roux v. Fick (vide supra) it was held that where two dogs together worried an ostrich, the owner of each dog was liable for half the damages sustained. [His Lordship referred to the evidence, and commented on the mistaken inferences of fact drawn by the Magistrate.] I have come to the conclusion that the appellant was entitled to a judgment for £17 5s., being the value of 23 sheep at 15s.

WRAGG, J.: It is difficult to reconcile some portions of the evidence recorded at the hearing of this case before the Magistrate. I am, however, satisfied, on that evidence, that the mischief done to the appellant's sheep was done by the dogs of the two respondents. I think, therefore, that our judgment should be for the appellant. We have satisfactory evidence that at least 23 sheep were killed by those dogs, and I would enter judgment for the appellant for £17 5s., being the value of that number of sheep at 15s. each, with costs.

I desire to record my opinion that the Magistrate was wrong in preventing the appellant from leading evidence as to the second claim for £11 15s.

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TURNBULL, J.: I agree with my learned brethren in the conclusion that 23 sheep were slaughtered by the respondents' dogs, and that the Magistrate's judgment should be corrected accordingly.

Per curium: The Magistrate's judgment set aside and turned into a judgment for the plaintiff in the Court below for £17 5s., with the costs of the Court below and of this review.

[GALLWEY, C.J., and WRAGG, J., intimated that one-half of the judgment and costs should be paid by each of the respondents.]

[Appellant's Attorneys: ANDERSON & WATT, Newcastle. 1st Respondent's Attorney: W. A. VANDERPLANK, Newcastle 2nd Respondent's Attorney: H. J. SHUTER, Newcastle.]

AGNES DORAN (Appellant) v. RICHARD DORAN (Respondent).

1892. Jan. **22** & 23.

Husband and Wife. Post-nuptial contract (Law 22, 1863, Doran v. sec. 7.) Partition of estate by agreement between spouses. Doran. Gift, power to make and revoke.

An agreement between spouses (executed after a post-nuptial contract removing community of goods from the date of execution) purported to value the joint estate and to apportion one-half to each of the spouses. The husband having transferred certain property to the wife in terms of the agreement, sued in a Circuit Court for cancellation of the transfer, on the ground that it had been made for no consideration and under a mistake in law as to what was actually claimable by the wife. He also claimed to have revoked any gift of the property. The learned judge found that the plaintiff was entitled to succeed, both on equitable and legal grounds, and gave judgment accordingly.

1892. Jan. 22 & 23 Held, on appeal, that the judgment should be affirmed.

Doran v. Doran.

Per Gallwer, C.J.:—A post-nuptial contract executed by spouses under s. 7, Law 22, 1863, declaring that from and after the date thereof there should be no community of property between the spouses, does not preclude the parties from deciding the conditions as to division of property upon which community was intended to be dissolved. In the absence of any agreement at the time, the question of what is a fair division of property is one proper for judicial decision.

Per Turnbull, J.: Such post-nuptial contract vests the property of the spouses in the husband. In such circumstances, the husband may lawfully bestow a gift upon his wife, not, however, binding as against creditors.

(in banco).

This was an appeal by the defendant from the judgment of WRAGG, J., at the Durban Circuit Court, on the 12th December, 1891.

The action was brought under the following circumstances:—

The plaintiff, Richard Doran, came to the Colony many years ago, and in 1876 acquired a property in Durban known as the European Hotel. In 1880, he married the defendant at Port Elizabeth, such marriage being in community of goods. At the time of the marriage, it appeared that the wife had no property of any value. A piece of land on the Back Beach had also been purchased by the husband, some time previously. In 1888, the spouses bought, apparently with the earnings of the hotel business, a leasehold lot on the Berea, which was transferred to the wife. Both these properties were afterwards mortgaged, buildings having in the meantime been erected on them.

On the 20th December, 1884, the spouses executed a postnuptial contract under Law 22, 1863, declaring that from and after that date there should be no community of property between them, but making no partition of the joint estate.

On the 12th August, 1885, the parties entered into an agreement purporting to value the common estate and to divide the same between the parties according to their respective rights. The European Hotel property was thereupon transferred to the wife, on the 22nd December, 1885.

It was now claimed on behalf of the husband that this 1892.

Jan. 22 & 23. transfer had been made without consideration, and on the erroneous supposition that the defendant, the wife, was in Poran r. law the owner of an undivided half-share of the common The plaintiff also claimed that in so far as this transfer created a gift, he had revoked the same, and he sued, inter alia, for a cancellation of the transfer of the 22nd December, 1885, and re-transfer of the property to himself.

The plea averred that the division of property agreed upon on the 12th August, 1885, did not involve a gift, but had been made in consideration of the removal of community, as verbally agreed upon prior to the execution of the post-nuptial contract.

The learned Judge gave judgment for the plaintiff for the cancellation of the deed of transfer of the 22nd December, 1885, and the re-transfer to the plaintiff of the property in question, he being entitled to the same as the owner

thereof.

The defendant appealed, substantially on the main ground indicated in the plea as summarised above.

Bale, for appellant:—The absence of direct authority bearing on the case is due to the fact that postnuptial contracts were unknown to the Civil Law, being regarded as donations between spouses and therefore not countenanced save in very exceptional instances. (Huber 26.1.8; Van Leeuwen, R.D.L., 4.24.12 : I Burge, 327 : V.D. Keessell, Th. 486; Voet 24.1.8). Until recently, the law at the Cape was in a similar state, as shown in the decided cases; and so also in this Colony, until the passing of Law 22, 1863. certain cases, however, donations between spouses, and other contracts between husband and wife, including that of permutatio, were recognised by the Law of Holland. In the circumstances of divorce, exile, and in some instances of unequal marriages, donations between spouses were allowed, the reason being that as in such cases there was a consideration, the gift became a donatio remuneratoria (Williams' Trustees v. Williams, 7 N.L.R., 93.) The acts of the parties show that there had been a parole agreement between them which was afterwards, on the 12th August, 1885, reduced to writing. The post-nuptial contract only removed community of goods from the date of execution. Law 22, 1863, is not intended to be retrospective save in so far as it affects persons married out of South Africa, and not as to the removal of community. Such a contract severs the partnership existing at the time of execution, when the wife was entitled to one-half of the joint estate (Van Leeuwen, Cens.

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For., 4. 23. 24). If, however, the husband gave more than his half, that would still be good, as there would be the consideration of the wife's abandonment of her future community in what is here a substantial estate, including a business being carried on. Community of goods ceased at death, or on divorce, or on judicial separation (Grotius, 3. 21. 11), and since Law 22, 1863, voluntary separation of property also put an end to community, save as to third The appellant has not got the half-share to which she is entitled. (V. d. Linden (Henry) p. 86; In re Kincaide, 4, N.L.R., 19). [He also cited I Burge, 370; Grotius, 2. 12. 5; Schore v. Schore's Executors, 1 Menz. 231; Ziedeman v. Ziedeman, ibid, 238; Boyson v. Boyson, ibid, 242; Grotius, 3. 2. 1, 6 and 9; Schorer's Notes, 3. 23. 11; Pothier, don. inter. viv., sec. 1, p. 26; Poth. ad Pand., 24, 1. 16, 23, 34 and 36; Albertus v. Albertus's Executors, 3 Searle's Reports, 202; Moreland's Estate v. Moreland, 5 N.LR., 25; In re Doran, 6 N.LR., 239; Hall v. Hall's Trustees and Mitchell, 3 Juta, 3; Kerr on Fraud and Mistake, 2nd Ed., 466 and 514: Voet, 19. 4. 1.

Morcom, A.-G.:—It is clear that Law 22, 1863, provides for a post-nuptial contract only in favour of the husband, in whom it vests all the property of the joint estate. The plaintiff thus became entitled to all the property which had been acquired by the earnings of the spouses (Law 22, 1863, sec. 6.) The defendant has in fact received more than her share. (Hillier v. Winder, N.L.R., 1870, 138). Kincaide's case (vide supra) shows that the effect of a post-nuptial contract is to put the spouses in the same position as to property as they occupied at the time of their marriage. (Fuller v. Fuller's Trustees, 4 N.L.R., 37).

[He was stopped by the Court].

Bale, in reply.

GALLWEY, C.J.: Assuming that the effect of the Circuit Court judgment is to determine a final settlement of the post-nuptial contract and the agreement executed subsequently thereto, I cannot see any advantage in altering that judgment. It is not necessary to go into the various questions involved in the case, and perhaps I arrive at my opinion on grounds different from those by which the learned Judge who tried the action was influenced.

If it be assumed that a post-nuptial contract executed under sec. 7, Law 22, 1863, has the effect of reinstating the spouses in the position as to property which they occupied

immediately before marriage, it would be right that there should be a division of the property in the same way as if Jan. 22 & 28. the community were dissolved by judicial separation, Doran v. divorce, or death. The only difficulty is that the postnuptial contract does not, in the present case, include a schedule setting forth the division of property intended by the spouses at the time.

In my opinion, it was not present in the minds of the framers of Law 22, 1863, nor in those of the Legislature, that while a wife or a husband could destroy the community subsisting between them, they could not, as free agents, decide the conditions upon which the community was to cease and a division of the estate be effected. It would be monstrous that the wife in executing such an agreement could make provision for herself. I am inclined to believe that the contract in question was a legal contract, entered into by the spouses, was binding between them, and that the wife could have insisted on provision being made for her as one consideration for her concurrence in the postnuptial contract. How it might affect creditors, either in or out of insolvency, it is not necessary now to consider.

I think, however, that there has not been a proper division of property in this case, and I look upon the appeal as taken with the object of determining what would be a pro-Holding as I do, that the decision of the learned Judge was fair and equitable, doing no injustice, but giving to each party the share to which he and she are respectively entitled, this judicial declaration of the division of property, which should have been settled at the time. ought not to be disturbed. The application must therefore be refused.

WRAGG, J.: The Durban lands, which the plaintiff (respondent) sought to recover in the action which I tried in the Circuit Court, were acquired by him four years before he married the appellant. At the trial I held that, when the post-nuptial contract, under Law 22 of 1863, was executed on December 12th, 1884, the result under that Law was that those properties returned to the sole dominium of the plaintiff (respondent) just as if there never had been a marriage with the appellant. That being so, I held that the transfer to the appellant under the agreement of August 12th, 1885, was bad for want of valuable consideration or of such consideration as the law would recognise. I, therefore, was of opinion that, in strict law, the plaintiff (respondent) was entitled to a judgment in his favour for those lands. Of course, the judgment dealt with the matter

Jan. 22 & 29. only as between husband and wife, without prejudice to their creditors.

Doran r. Doran.

Notwithstanding the learned argument at the hearing of this appeal against that judgment, I think that it was right and that it ought to stand.

As to the equities of the case, I am really surprised that the defendant should have appealed. I should have thought that she would have been grateful that the judgment freed her from the giving of accounts, in connection with her management of the European Hotel, to which the respondent was strictly entitled, that it left her in possession of that hotel-stock, and furniture, valued in the agreement of August 12th, 1885, at the large sum of £1,250, and that it did not condemn her to pay the respondent's costs. over, she retains the Berea property, discharged from encumbrance with money realized from her husband's other properties. Were she to succeed in this appeal, her husband the respondent, would be left absolutely without a penny, while she would remain in triumphal possession of all the property, which, whatever may be said against him, he had before he married her or acquired therefrom subsequently.

The appellant ought to pay all costs of this unsuccessful appeal.

TURNBULL, J.: Notwithstanding the able argument of Mr. Bale, and the numerous authorities cited by him, I consider that, in view of the law and the circumstances of this particular case, the judgment of His Lordship Sir Walter Wragg was a right and proper one. To my mind, the defendant has no just cause of dissatisfaction, as I think that where spouses deal with each other in good faith, and neither is ignorant of any material fact, a post-nuptial contract under sec. 7, Law 22, 1863, vests the joint property of the spouses in the husband, as if (sec. 2) community of goods had never existed between them. I see nothing to prevent a husband making a gift to his wife under such circumstances. In the present case, too, the wife has been very fairly treated, as she appears to have received, from her husband. property shown by valuation in 1885 to exceed the moiety of the estate to which she was entitled before the postnuptial contract was executed. A gift so made would not of course hold good against creditors, otherwise Law 22, 1863, would be the means of offering great inducements for dishonest spouses to place their property beyond the reach of creditors. I consider that the application should be refused.

GALLWEY, C.J.: The effect of the judgment of the majority of the Court is that if the husband were to die tomorrow intestate the wife would be entitled to one-half of Doran v. the property.

Per curiam: Application refused.

[Appellant's Attorney: W. E. Shepstone. Respondent's Attorneys: Dillon & Labistour.]

In re The Testate Estate of George Joseph Cato.

1892. February 16.

Executor. Testate estate. Remaining executors testamentary authorised to act. Practice.

One of three executors testamentary having been placed under curatorship, the remaining executors authorised to act in the administration of the estate.

(In camera). Before GALLWEY, C.J.

Morcom, A.-G., on behalf of the remaining executors testamentary of the estate of George Joseph Cato, moved for an order authorising them to continue to act in the administration of the estate. The person and property of the third executor had been placed under curatorship (vide 12 N.L.R., 233). The will contained provision for the replacing of an incompetent executor, but the applicants had been unable to obtain a suitable person to act. They desired that the eldest son of the deceased (a minor) should, on attaining his majority, assume the duties of an executor.

Counsel cited in re Aithen (8 N.L.R., 36).

Per Gallwey, C.J.: The remaining executors authorised to act as prayed without the assistance of any other executor, until the coming of age of the eldest son of the deceased.

[Applicant's Attorney: R. F. MORCOM.]

1892. In re THE INTESTATE ESTATE OF ROBERT BRUCE BARCLAY.

In re Barclay. Executor. Intestate estate. Minor's portions. Unauthorised investment. Master's approval. Accounts. Practice.

Where minor's portions had been invested by an executor dative without the authority of the Court, the liquidatim and distribution accounts confirmed, subject to the Master's approval of the investments made.

(In camera.) Before GALLWEY, C.J.

Tainton moved for the confirmation of the Executor's Dative first and final liquidation and distribution accounts. It appeared that the executors (who were also the minors' guardians) had invested the children's portions at mortgage.

Per Gallwey, C.J.: The accounts confirmed, subject to the Master's approval of the investment of the minors' portions.

[Applicants' Attorney: J. W. TAINTON.]

1892. February 28. In re The Testate Estate of Edward Crampton Leech.

Executor. Testate Estate. Leave to sell landed property.

Executors testamentary authorised to sell the landed property of the estate, upon the consent of all the beneficiaries save two who had not been heard of for a number of years, and who were believed to have died without issue, saving, however, the rights of the latter.

(In camera.) Before GALLWEY, C.J.

Bale, for the executors testamentary, moved for an order as above, on the consent of all the beneficiaries, save two, who were believed to have died without issue.

Per GALLWEY, C.J.: Order as prayed, saving, however, the rights of the absent heirs to their share of the estate.

[Applicants' Attorney: HENRY BALE.]

NATAL LAW REPORTS

(NEW SERIES) VOL. XIII., PART II.

MARCH, 1892.

- MARY ANN BARNS (First Plaintiff) and MARY ANN BARNS 1892.

 and WILLIAM COCKERILL BARDWELL, Executors and Trustees testamentary in England of the Estate of Sarns and Others v. Mac-Robert John Barns (Second Plaintiffs) v. WILLIAM fie & another.

 McFie and Harry Escombe, Executors of the same estate in Africa (Defendants).
- Will. Estates in different countries. Annuity charged on residue of particular estate. Powers and obligations of several sets of executors and trustees. Extrinsic evidence. Pleading. Exceptions.
- A testator left an estate situated in England, America, and Africa, appointing by his will a separate set of executors and trustees in each country. Certain annuities were created, payable out of the residue of the English estate, and, as to the properties in America and Africa, there were minute directions for their disposal, involving the carrying on of a "ranche" for a term of years and the payment of certain annuities and charitable bequests.
- The annuitants whose legacies were charged on the English estates sued the African executors and trustees, in Natal, for a judgment, directing inter alia, the executors and trustees of the African estate to pay thereout the annuities bequeathed, there being no funds or estate in England to satisfy the same, and the American property not being available for that purpose.
- The declaration also set forth a certain draft will with alterations by the testator.

March 1 and 2

Barns and others v. Mac-

fie & another.

exceptions by defendants to the declaration, on the grounds (1) That the African Trustees had not power or were not under any obligation to use any portion of the African property for other trusts or purposes than those specifically stated in the will with reference to that property. (2) That if the legacies bequeathed from the English estate were payable, so far as the English property was insufficient, from the general estate, then such legacies were not payable solely out of the African estate. (3) To so much of the declaration as averred facts relative to the draft will and instructions, there being no ambiguity in the will such as to allow of extrinsic evidence. (4) That the African estate was not liable under the will to satisfy the mortgages on the American estate, save so far as that property might be insufficient for that purpose:

HELD: Without deciding on the rights of various persons claiming under the will, (1) That the 1st exception was too wide and should be disallowed. (2) That the 2nd exception could not be sustained, the American executors not being parties to the action. (3) That the 3rd exception should be sustained, and (4) That in the absence of any evidence as to the American law of mortgage, the 4th exception should be disallowed.

HELD, further: That the action had been rightly brought in Natal.

March 1. (in banco) before GALLWEY, C.J. & TURNBULL, J.

This was an argument on the defendants' exceptions to the plaintiff's declaration in an action involving the construction of the will of Robert John Barns. The first plaintiff, the testator's wife, was a legatee under the will, an annuity in her favour being charged upon the residue of the testator's English estate, subject to certain legacies, in the following terms:—

"And subject as aforesaid, I declare that the whole of "my said residue real and personal estate shall be "held upon trust to raise and pay thereout to my said "wife during her life an annuity of three hundred "pounds."

The widow sued in her own capacity, and also jointly March 1 and 2 with the English executors, for an order directing the executors and trustees of the African estate to pay thereout Barns and the annuities bequeathed.

The other material averments in the declaration, and the nature of the exceptions taken by the defendants, are sufficiently indicated in the head-note and in the judgment afterwards delivered.

Hathorn, for defendants, in support of the exceptions.

Bale, for plaintiffs, argued in support of the declaration citing the following authorities: Williams on Executors, vol. 2, p. 1041, et seq., and cases therein cited; Baldock v. Green, 40 Chan. Div., 610; Harrison v. Jackson, 7 Chan. Div. 339; Jarman on Wills, vol. II., pp. 613, 635.

[GALLWEY, C.J. here intimated that the Court would not, upon the present application, decide as to the construction of the testator's will].

Hathorn, proceeding, argued that there was a specific legacy to the trustees of the African estate which could not be set aside by a demonstrative legacy to the widow. cited Page v. Leapingwell, 18 Vesey's Reports, 463; Nisbett v. Murrry, 5, ibid, 149; Roper & White on Legacies, vol. I, p. 195, et seq., and cases therein cited; Gordon v. Gordon, (5 L.R., H.L., 254).

Bale, in reply, cited Mann v. Copland 2 Maddocks' Rep., 223; Willow v. Rhodes, 2 Russell Rep. 452; Broadbent v. Barrow, 20 Chan. Div., 676; Oliver v. Oliver, 11 Eq., 506; Voet, 34. 4. 6, 35. 1. 4, and 25. 1. 5.

GALLWEY, C.J.: The Court has been asked to decide, or to make a declaration of, the rights of different persons claiming under the will of Robert John Barns, with regard to property situated in England, in America, and in this Colony. The will has been so often referred to during the arguments that it is only necessary for me to say that Mr. Barns appointed a different set of executors and trustees for the estate in each of the countries named. The will directed certain annuities to be paid out of the English property, and the claim as to these is really the only matter before us, as the rights of American claimants, in their absence, cannot be determined now. It appears that the general estate in England is not sufficient to pay the claims against that estate, and for that reason, in the absence of

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Barns and others v. Mac-

the requisite funds, the English executors and trustees come to this Court to ask that funds specially devised and bequeathed to two trustees in this Colony, on specific trusts—so far as the income but not the corpus is concerned—may be sent to England to pay the annuities charged upon the estate in the latter country. It has been objected that the action cannot be decided in this Court, and that the Natal trustees are under no obligation to remit money to England, except for the purposes contemplated in the trust of the African estate. There is, I find, no provision in the will for payment of debts from the African estate, save in so far as they have been incurred in, and are payable in, Africa, or are fairly attributable to the business or property in that country.

Without, however, in any way determining the rights of legatees, the first exception is, in my opinion, altogether too wide, and should be disallowed. The second exception seeks a declaration from us that, if the English property is insufficient, the American property should be marshalled as assets to meet the debts of the English estate. The American executors, however, are not before us, nor are any creditors of that estate, and we are on that account precluded from making any such declaration, so that the

second exception must also be disallowed.

As to the third exception, it is one which should be sustained. We can only construe the will according to its written words, and I cannot myself see any reason for in-

cluding in the declaration the clauses excepted to.

The fourth exception cannot be allowed, as, although the provisions of the will appear to be in harmony with the English law of mortgage, we have no evidence as to the American law in that respect.

TURNBULL, J.: I entirely concur. It seems at first sight unfortunate that the action had not been brought in England, as most of the parties are there, as also some of the property. Under the circumstances, however, I do not see how the plaintiffs in the first instance could have done otherwise than sue in this Court.

Ver curiam: The 1st, 2nd, and 4th exceptions disallowed. The 3rd exception sustained. Costs to be costs in the cause.

[Plaintiffs' Attorney: H. Bale.
Defendants' Attorneys: HATHORN & MASON].

In re THE Assigned Estate of Melidor Cheron.

1893. January 22. March 2, 8, 4.

Assigned estate. Account, objections to. Question of owner-In re Chéron. ship of property. Indian Immigration Trust Board.

Preference for Coolie instalments and costs of obtaining judgment therefor.

Objections to account, although showing primâ facie grounds, not sustained, as being insufficient to justify a disturbance of the account, and as involving questions of ownership of property, the evidence as to which was conflicting. The objecting creditor accordingly left to proceed by action to establish his claim.

Costs of the Indian Immigration Trust Board, incurred in 1886 and 1887, in obtaining judgment for coolie instalments, declared to be preferent, the objection that the Board, by failing to enforce payment at the time, and even after notice to press for the same had been given by the first mortgagee, had slept on its rights and so waived its preference—not being sustained by the Court.

This was a hearing of objections taken by a mortgage creditor to the first and final liquidation accounts filed by the trustee of the assigned estate of Melidor Chron, upon the grounds (1) That the trustee had improperly ranked as preferent a sum of £82 10s. 11d. claimed by the Indian Immigration Trust Board, being the amount of certain taxed costs incurred by the Board in obtaining judgment against the assignor in the years 1886 and 1887, upon the grounds indicated in the second paragraph of the headnote. (2) That the trustee had improperly ranked Mrs. Cheron as being entitled to receive a sum of £117 11s. 7d. the proceeds of certain sugar manufacturing machinery sold at public auction, the same being the property of the estate, and included in the mortgage bond held by the objecting creditor. With regard to the latter claim, the affidavits as to ownership were voluminous and somewhat conflicting.

January 22nd, 1892. In banco.

Mason, for the objecting creditor.

Laughton, for Mrs. Cheron.

1892.
January 22.
March 2, 3, 4.
In re Chéron.

Yonge, for the trustee.

Morcom. A.G., for the Indian Immigration Trust Board.

Postea, March 2nd, 1892 (in banco, before GALLWEY, C.J. and TURNBULL, J.)

Hathorn, for the objecting creditor: The bills of costs of the Indian Immigration Trust Board, though in respect of judgments obtained in 1886 and 1887, were not taxed until August, 1891, after the assignment had been registered. The costs should have been taxed at the time, and, by its neglect, the Board has waived its claim. [Estate Acutt, 8 N.L.R., 225; Evans v. Meyer & de Chazal, 6 N.L.R., 130; Buck v. Barker, 1 Menz. 81.] As to the second objection, the property comes within the 54th. section of the Insolvency Law, as "reputed property" of the assignor. The appliances were part of the machinery used by the assignor "in his business."

Morcom, A.G.: The judgments were obtained from time to time in order to preserve the preference of the Indian Immigration Trust Board, and the forbearance of the Board in regard to the costs does not destroy that preference.

Laughton referred to the facts, and contended that a question of title to property could not be decided on a motion.

Postea, March 3rd, 1892 (in banco, before Gallwey, C.J. and Turnbull, J.

Laughton cited Van Rooyen v. Laatz, 8 N.L.R., 103 and 230, as showing that the trustee should be left to establish his rights by an action. Also estate Brown, 5 N.L.R., 301.

GALLWEY, C.J.: In this case, taking the second objection first, whether properly or improperly, the trustee has ranked Mrs. Cheron as a creditor for an amount in respect of certain property claimed by her, and if no objection had been lodged she would have become entitled to receive the money. She is, however, sought to be dispossessed of the property by the objections to the account now brought before us. The objection is so far good, as it shows a prima facie ground for disturbing the account, though, in view of the conflicting nature of the evidence, I am not prepared to say that sufficient grounds have been disclosed. An issue should, therefore, be brought, and the person

seeking to disturb the party in possession is the right party 1892.

to sue. As, however, only two persons are interested, the March 2, 3. 4.

matter appears to be one proper for settlement by compromise. Costs will be reserved.

As to the other objection, I do not see how it can prevail. It appears that the Indian Immigration Trust Board, who are substituted for the Government for the purposes of sec. 60, Law 2, 1870, have done everything necessary to establish their claim. It is admitted that there is a preference, but that is sought to be set aside on the ground that the Board did not take further proceedings, the effect of which would possibly have been to make the debtor insolvent. It has not been shown that the forbearance of the Board has wrought any injury to the estate. This objection will, therefore, be disallowed. (Est. Acutt, 8 N.L.R., 228).

TURNBULL, J. concurred.

Per curiam: The first objection disallowed. As to the second objection, the objecting creditor left to proceed by action to establish his claim to the sum claimed to belong to the estate. Costs reserved.

Postea, March 4th, 1892 (in banco, before GALLWEY, C.J. and TURNBULL, J.)

Save as to the second objection, the accounts confirmed.

[Attorneys for the objecting creditor: GOODRICKE & SON

Attorneys for Mrs. Cheron: CARMICHAEL, GREENE & LIVINGSTONE.

Attorney for the Indian Immigration Trust Board: W. E. Shepstone.

March 3.

Madere r.

Durban Corporation.

Haynes s,

Durban Corporation.

- ALEXANDER CHARLES MADORE (Appellant) v. THE COR-PORATION OF DURBAN AND ALFRED GEORGE LEWIS HOUGHTING (Respondents) AND THOMAS ERNEST HAYNES (Appellant) v. THE SAME.
- Municipal Corporation. Town Council sitting as Licensing Board. Retail liquor license. Granting of license refused to same applicant at a prior meeting.
- The mere refusal by a Town Council, sitting as a Licensing Board, at a prior meeting, to grant an application for a retail liquor license, without any grounds being stated for such refusal, does not preclude the Board from granting such a license to the same applicant at a subsequent meeting.
- The proceedings of a Town Council, sitting as a licensing board, are to be in accordance with the provisions of sec. 10, Ordinance 9, 1847, the Town Council being substituted for the Magistrate as the licensing authority.
- A retail liquor license granted on the 31st December of one year for the whole of the following year, held to have been rightly granted, notwithstanding the provisions of a licensing regulation, made by the Town Council, to the effect that a license granted in any month other than November, should be only "for the unexpired portion of that year."
- SEMBLE: A municipal by-law or regulation having the effect of restricting the meetings of the Licensing Board to a single meeting in each year, would, so far, be ultra vires, not being authorised by the Municipal Corporations Law, and being repugnant to the provisions of Ordinance 9, 1847, secs. 8–10.

(in banco) before GALLWEY, C.J. and TURNBULL, J.

These reviews were brought in respect of the granting by the Durban Town Council, on the 31st December, 1891, of a retail liquor license (known as a "bar" license) for the year 1892, to the second respondent, Houghting.

The appellant Madore, a licensed dealer, had been an objector to the granting of the license. The appellant Madore v. Madore v. Durban Cor-

ance Mission, of which he was Vice-President.

The grounds of review, which were practically identical Haynes v. Durban Corin each case, set forth (1) That the application of Hought-poration. ing for a bar license, in respect of the same premises, for the year 1892, had already been dealt with and refused at the ordinary licensing meeting of the Town Council in the month of November, 1891. (2) That the Town Council had no power, under the 9th section of the licensing regulations of the Borough of Durban, passed in terms of sec. 71, Law 19, 1872, to grant a license for the year 1892.

The 9th section of the licensing regulations, referred to above was as follows: "In and after the year 1884, the month of November shall be the licensing month, and no application for new licenses shall be considered in any other month, except on payment of an additional sum of £10 sterling, and then only for the unexpired portion of that year, or on such special terms as the Town Council may by

resolution impose.

On the 19th November, 1891, the ordinary meeting of the Licensing Board was held, when the respondent Houghting's application for a "bar" license was refused by the Board, without any grounds being stated for such refusal. A special meeting of the Board was held on the 31st December, 1891, having been called, as shown by the minutes "in pursuance of the 9th section of the licensing regulations, for the purpose of considering an application from Mr A. G. L. Houghting, for a bar license at his premises known as "Poynton's Corner," from 1st January, 1892 to 31st December, 1892."

Several memorials for and against the application among the latter being those of the appellants-having been heard, the Board granted the application by six votes to three.

Pitcher, for the appellant Madore, contended that, so far as the Board was concerned, the application coming before them on the 31st December was res judicata, in consequence of their refusal of the license on the 19th November. there being no new circumstances adduced. On the 2nd. ground of review, the board could only grant a license for the remainder of the year 1891.

[GALLWEY, C.J. referred to Maughan's case (1 Q.B.D. 49) and Reg. v. Justices of W. Riding--Drake's Case-(5 Q.B. 33).]

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Bale, for the appellant Haynes, urged that the Licensing Board had not exercised a a judicial discretion, as they had neglected to give due weight to the objections urged; and that, if the proceedings were upheld, it would be competent to any applicant, by mere perseverance, to obtain a decision in his favour. Maughan's case (vide supra) was distinguishable, as there the application was renewed at an adjourned hearing of the same sessions.

Morcom, A.G., for the Town Council: Sec. 4, Law 23, 1863, allows an appeal to the Supreme Court, but only when a license has been refused or obtained fraudulently. A refusal to grant a license is not res judicata, either against the person or the premises. (Drake's case—vide supra) That doctrine was extended in ex parte Maughan (vide supra). The applicant here complied with all the licensing regulations, and the Board was bound to act in terms of sec. 10, ordinance 9, 1847. If the 9th regulation can be taken to hamper the right of an applicant to have his application considered, then it is ultra vires. [GALL-WEY, C. J.: Is it not fair to regard the second meeting as an adjournment of the former meeting?] It is so contended. The license, though granted on the 31st December, only took effect from the 1st January.

Labistour, for the respondent Houghting: The Corporation cannot by regulation go beyond the powers conferred by Law 19, 1872. (Roberts v. Durban Corporation, 2 N.L.R. 206). The right of any person to apply at any time for a license, under Ordinance 9, 1847, cannot be abridged (Durban Corporation v. Vonck 8 N.L.R., 251). Here, the "unexpired year" is 1892, the period for which licenses issued at the usual time, in November, were granted.

Bale, in reply, cited Roseveare v. P.M.Burg Corporation (2 N.L.B., 174) as to the appellate jurisdiction.

TURNBULL, J.: I do not know what variation there may have been between the respective circumstances under which the two applications were considered by the licensing board, so as to induce that body to alter, on the 31st December, their decision of the 19th November; but I must assume that the second application was not on all fours with the former one. The Board had, on both occasions, the advantage of having before them the applicant and the several objectors; and, as the Board seems to have been in possession of much more information than has been placed before this Court in the somewhat imper-

feet record of proceedings furnished to us. It would also appear that many of the objectors had not the locus standi required by sec. 10. Ordinance 9, 1847, and, on the whole, Madore v. I consider that the license was rightly granted, and the poration.

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GALLWEY, C.J.: This is an application for a review of the proceedings of the Durban Licensing Board, at a meeting held on the 31st December last, on two grounds. [His Lordship read the grounds in the writ of review.] Now, we have had before us a very meagre record of what took place at the meetings of the 19th November and the 31st December—in fact nothing much more than that the license was refused by a majority of votes at the carlier meeting and was granted by a majority of votes at the later meeting. The Town Council has, by legislation, been substituted for the Magistrate as the licensing authority, and I think that we ought not, sitting as a Superior Court, to throw technicalities in the way of carrying out a decision come to by the Licensing Board in the exercise of their judgment. Such bodies have a right to look to us to support them in their decisions, pronounced by persons duly authorised and at a properly constituted meeting, and we ought to be just as careful in reviewing a finding so arrived at as we should be in setting aside the verdict of a jury on questions of fact alone. There is not a single word in the writ of review as to whether the decision of the board of the 31st December was based on any new facts or arguments, in the light of which the former objections to granting Houghting's application could be regarded as removed It is possible that there may have been such or modified. new grounds, although they do not appear on the record. I do not intend to lay down any new rule or principle of law, nor even to extend any doctrine already approved by this Court, but I regard the cases of Vonck and Roberts (vide supra) as showing that the mode in which a retail liquor license has to be applied for and issued is precisely the same as if it had still to be granted by the Magistrate under section 10, Ordinance 9, 1847. There is direct authority for this view in Sir Henry Connor's considered judgment in Roberts's case (vide supra). The Magistrate's Court was an open Court at all times for the granting of licenses, and, therefore, any By-Law restricting the proceedings of a licensing board to a single meeting in the year, not being contemplated by the enabling Law, No. 19, 1872, is, so far, ultra vires.

It is not very clear at what time or for what period a Magistrate could grant a retail license under Ordinance 9,

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1847, but it would appear that he could, during one year, grant such a license for the whole of the following year.

With regard to the other ground of review, I am clearly of opinion that the mere refusal of a license, by the Licensing Board, without any grounds being stated, would not preclude the board from granting such a license, to the same applicant, at a subsequent meeting. We must consider the former objections as having been removed, and, under all the circumstances, the finding of the Board should be affirmed. (Reg. v. Thomas, 1 Q.B.D. (1892) 426.)

Per curiam: Application refused, with costs against the appellant Madore.

[Attorney for the Appellant Madore: W. E. SHEPSTONE. Attorneys for the Appellant Haynes: H. Bale & Wylie. Attorney for the Respondent Corporation: H. ESCOMBE. Attorneys for the Respondent Houghting: DILLON and LABISTOUR.]

1892. THE INTESTATE ESTATE OF JOHANNES GRADUS SCHRUER. March 3 & 4.

In re Schruer. Executor Dative. Intestate Estate. Objections to Accounts.

Minor heirs. Appointment of curator ad litem.

At the hearing of objections to the accounts of an executor dative of an intestate estate, order made by the Court for the appointment of a curator ad litem to represent the minor heir.

March 3rd. (In banco, before Gallwey, C.J., and Turn-Bull, J.)

Laughton, in support of the objections.

Hathorn, for the executors dative.

Postea: March 4. (In banco, before GALLWEY, C.J., and TURNBULL, J.)

Counsel as before.

March 8 & 4.

In rc Schruer.

GALLWEY, C.J.: It is absolutely necessary that the minor's interests should be protected (Louw v. Louw, Buch. Rep., 1874, 41; Letterstedt's case, ibid., 158). We must appoint a curator ad litem, and we shall then be able to see how far we can allow him, on behalf of the minor, to avail himself of the objections taken to the account.

Per curiam: Curator ad litem appointed accordingly. Reference to Master for report on objections and the estate generally.

[Attorneys for the Executors Dative: HULLETT & LANGSTON. Attorneys for the objectors: LAUGHTON & TATHAM.]

THE INSOLVENT ESTATE OF JOHN ARNISON DODD.

1892. January 22, March 4.

Insolvency. "Costs of Administration." "Presenting and In re Dodd. prosecuting" debtor's petition. Contribution account. (Sections 17 and 138 of the Insolvency Law, 1887).

Section 17 of the Insolvency Law, 1887, provides that "the cost of presenting and prosecuting a debtor's or creditor's petition . . . shall be a first charge on any assets realised in the insolvent debtor's estate, and shall, after having been first taxed and allowed by the Master, be paid by the trustee as a portion of the costs of administration. . . If the assets realised by the trustee in any insolvent estate are insufficient to meet the costs of administration, the creditors who have proved concurrent claims on the estate shall be personally liable for such costs in proportion to such claims."

HELD: That the costs so provided for included the costs of renewed applications by the debtor on his petition for surrender, such renewed applications being rendered necessary by opposition to the petition, based on inaccurate schedules filed by the petitioner and subsequently amended by leave of the Court.

January 22. March 4. In re Dodd HELD, therefore: That such costs, as taxed, should rightly be included in a contribution account filed by the trustee in terms of sec. 138 of the Iasolvency Law, 1887. Costs, however, reserved.

January 22, 1892. (In banco).

Laughton objected to the liquidation and contribution account filed by the trustee, on the ground that a sum of £14 13s., the taxed costs due to his firm in and about the presentation and prosecution of the debtor's petition, had not been included therein. He relied on the provisions of section 17 of the Insolvency Law, as set forth in the headnote.

The original statement of affairs showed assets valued at £35 8s. 6d. It appearing to the Court, on the hearing of objections urged by a creditor, that all the assets had not been disclosed, leave was granted to amend the schedules (vide 12, N.L.R., 131), and the surrender was ultimately accepted. The assets, valued at £166 14s. 9d., yielded only £7 6s., while the administration expenses amounted to £8 17s., thus necessitating a contribution by the only proving creditor.

Bale, for the proving creditor: The "costs of presenting and prosecuting" the petition include no more than the ordinary expenses. The surrender was successfully opposed on two applications, and the Court ordered an amendment of the schedules. The proving creditor ought not therefore to pay costs incurred by reason of the debtor's own default. The Court has a discretion, in the case of a contribution account, under the 138th section, the proviso to which must be read with the 17th section. The creditor, by proving, showed a bona fide belief that there would be a sufficiency of assets, and it would therefore not "appertain to justice" (section 7) that he should pay all the costs.

Laughton, for the objectors: A creditor need not oppose a debtor's petition, and he can avoid liability by not proving. "Prosecuting," in section 17, implies the continuance of proceedings consequent on opposition.

Postea: March 4. (In banco, before GALLWEY, C.J., and TURNBULL, J.)

Laughton resumed, citing in re Sutton (12 N.L.R., 276).

[He was stopped by the Court.]

Bale, in reply: The debtor did not present a true petition. He had no opportunity of opposing at the taxation of the bill of costs.

January 22. March 4. In re Dodd.

GALLWEY, C.J.: This estate owes a certain sum for costs of administration, and these costs must be provided for in a contribution account. We cannot, however, make any order at the present stage as to costs. There is a great deal of force in Mr. Bale's argument that under special circumstances a party may become disentitled to his strict rights under the Law.

TURNBULL, J., concurred.

Per curiam: The contribution account ordered to be amended by including therein the taxed costs of presenting and prosecuting the debtor's petition. Costs reserved.

[Attorneys for the objectors: LAUGHTON & TATHAM. Attorney for the proving creditor: H. BALE.]

In re THE INSOLVENT ESTATE OF ALEXANDER CAMPBELL McEwan.

to the second se

1892. March 4.

In re McEwan

Insolvency. Proof of debts and voting by secured creditor. Resolution binding mortgage creditors. Realisation of immovable property. Law 47, 1887, secs. 107, 119, 120, Sched. 1, sec. 12, and Sched. 2, sec. 8.

Resolutions, passed at a meeting of creditors, by the votes of two concurrent creditors for small amounts and of a fourth mortgages in respect of a small balance due after deducting the value of the security, the effect of such resolutions being to grant a lease of the mortgaged property and to prevent its speedy realisation, HELD, not to be competent as binding prior mortgages, who had proved their claims, to a delay in realising the mortgaged immovable property of the estate. The resolutions, therefore, ordered to be set aside, so as to allow the trustee to deal with the mortgaged property.

1892. March 4. Per GALLWEY, C.J.: Section 107 of the Insolvency Law, 1887, must be read together with the provisions of secs. 119 and 120.

The effect of Schedule 1, sec. 12, and Schedule 2, sec. 8, of the Insolvency Law, 1837, discussed.

(In banco, before GALLWEY, C.J., and TURNBULL, J.)

Greene, for the trustee, moved for an order disapproving of the action of certain creditors, and of the conditions imposed by them upon the sale of the immovable property of the estate, and for an order authorising the trustee to proceed forthwith with the sale of the landed property for the benefit of the bond-holders. He sought for the disallowance of resolutions passed at a meeting of creditors held on the 15th January, 1892, having the effect of granting a six months' lease of the immovable property, on certain terms, postponing the sale of such property until the expiry of the lease, and authorising the trustee to negotiate for such sale, but to submit any offer to a special meeting of creditors.

At the meeting of the 15th January, there were present or represented the first and three subsequent bond-holders, and two concurrent creditors for small amounts. The resolutions were passed by the vote of the latter and that of the fourth mortgagee in respect of a balance of £10 between the amount of the bond and interest and the value set upon the claim (section 12, Schedule 1, Law 47, 1887). The other secured creditors who had proved for the full amount of their claims refrained from voting, not wishing to surrender their security under the section last referred to.

Tatham, for the fourth mortgagee and two concurrent creditors, contended that the prior mortgagees had put themselves in their present position by proving for their claims. Section 120, Law 47, 1887, only applied to the case of ordinary creditors who had not proved. The position of secured creditors as to voting was clearly shown by schedule 1, sec. 12, and schedule 2, sec. 8, of the Law. [Gallwey, C.J.: The spirit of the Law is opposed to allowing concurrent creditors to pass a resolution prejudicing secured creditors. Section 107 of the Insolvency Law must be read subject to secs. 119 and 120.] The trustee cannot move the Court in favour of any particular class of creditors, to the prejudice of another class.

GALLWEY, C.J.: One positively shudders at the effect of resolutions passed against mortgagees whose claims amount Even if In re McEwan to over £2,000 by concurrent creditors for £41. the resolution were in itself legal, it is against the law of the Colony that a lease can be effected contrary to the wish of a mortgagee. It would be monstrous if the insolvent were allowed to keep his creditors at arm's length by arranging for a lease and stipulating that no sale should take place until he should receive £500 and the creditors had given their consent at a special meeting. Such a resolution, if confirmed by this Court, would go far to depreciate the value of mortgage investments in this Colony. resolutions of the 15th January, 1892, must be set aside and permission given to the trustee to deal with the mortgaged property as the law allows, for the benefit of the secured creditors.

March 4.

TURNBULL, J.: I quite concur. I think that agents should warn the mortgagees from whom they obtain bonds to prove in insolvent estates of the embarrassing position in which they may place themselves by proving their claims.

Per curiam: Order accordingly. No costs.

Applicant's Attorneys: Greene & Carmichael. Respondent's Attorneys: LAUGHTON & TATHAM.]

In re THE INSOLVENT ESTATE OF HENRY CHICHELEY BALLANCE.

March 5. In re Ballance.

Insolvency. Notice in Gazette of intention to present debtor's Transfer of immovable property sold by debtor. petition.

The notice, published in the Gazette in terms of sec. 7, Law 47, 1887, of an intended application upon a debtor's petition for the surrender of his estate, is not an act of insolvency, and will not prevent the transfer to the purchaser of immovable property sold by the debtor some years previously, as evidenced by receipt for transfer duty and power of attorney.

(In banco, before GALLWEY, C.J., and TURNBULL, J.)

March 5.

This application was made on the 5th March before GALLWEY, C.J., in Chambers, and was directed by His Lord-

here Ballance. ship to be brought before the full Court.

A piece of land in the Borough of Durban had been sold in 1886 by H. C. Ballance. Power of attorney to transfer, dated 27th September, 1886, and receipt for transfer duty, dated 19th June, 1888, were put in, and the transaction was fully disclosed in affidavits now filed. The Gasette of the 23rd February, 1892, contained a notice by H. C. Ballance of his intention to move for the surrender of his estate, the motion being on the cause list for the day.

R. F. Morcom moved for an order authorising the transfer; and submitted that the notice had not the effect of an order for sequestration under which the property sought to be transferred would have to come in as an asset (Harris v. Harris' Trustees, 2 Menz., 113; Norden's Trustees v. Norden, ibid., 136; Jayela v. Pechey Bros., 6 N.L.R., 286). The petition had only been advertised, and not having been presented, there was no act of insolvency (Law 47, 1887, sec. 4, sub.-sec. f). [He also cited ex parte Harrison, in re Isawford, 3 Jurist, N.S., 228.]

GALLWEY, C.J.: The difficulty that I had was that if there had been an act of insolvency the sequestration might date back to the notice. I observe also that the mortgage of £250 has been paid off. The order may issue, as prayed.

TURNBULL, J.: The debtor may still withdraw his petition, which in fact has never been presented (Law 47, 1887, sec. 5). The application may be granted.

Per curiam: Order as prayed.

Note.—Postea: On the same day, the Court accepted the debtor's petition for the surrender of his estate.

THE CORPORATION OF PIETERMARITZBURG (Plaintiffs) v. THE MEMOUTORS OF JOHN WADE (Defendants).

Municipal Corporation. Judicial Sale. Right of Corporation of P.M. Burg v. tion to buy in as mortgagee.

The power of a Town Council to accept mortgage bonds for the purchase price of municipal lands invests the Corparation with the usual powers of a mortgagee, including that of buying back such lands so mortgaged when sold under judicial process.

January 16, 1892. (In banco).

Mason moved for confirmation of the Master's report of the judicial sale in the above action. The Corporation had become the purchasers of property sold under their own bond.

Posten: March 8, 1892. (In banco, before Gallwey, C.J., and TURNBULL, J.)

Greene renewed the application, and referred to a previous case in point (Corporation v. Tod, October 21, 1884—not reported).

Per Gallwey, C.J.: I presume that the power to take mortgages invests the Corporation with all the usual powers of a mortgagee.

Per curiam: Sale confirmed and transfer to the purchasers authorised.

[Applicants' Attorneys: GREENE & CARMICHAEL.]

1892. March 10. JOHNSTON & MOULTON (Plaintiffs). v. THE COMMERCIAL UNION ASSURANCE COMPANY, LIMITED (Defendants).

Johnston & Moulton v. Commercial Union Assurance Co. (Ld.)

Insurance. Arbitration clause. Condition precedent or collateral. Pleading. Exceptions.

A policy of fire insurance contained the following clause:—
"If any difference shall arise with respect to any claim for loss or damage by fire (and no fraud suspected, and the company does not elect to rebuild, repair, reinstate, or replace same) such difference shall be submitted to arbitrators, indifferently chosen, whose award, or that of their umpire, shall be conslusive."

HELD (TURNBULL, J. diss.): That this was not a condition precedent to any action brought by the insured against the Company in respect of loss by fire, there being no condition in the policy as to the mode of ascertaining the amount of loss. [Scott n. Avery, 2 Jur., Pt. I., N.S., 815, and Davies v. The South British Insurance Co., 3 Juta., 416, distinguished.]

(In banco.)

This was an action to recover £950 on a fire policy.

The defendants pleaded (1) That a difference had arisen between the parties within the meaning of the 15th condition [set forth in the head-note]. (2) That such difference was in respect of the plaintiff's claim for loss or damage by fire, and no fraud was suspected, and the defendants had not elected to replace the damaged goods. (3) That the defendant company were, and always had been, ready and willing to submit the difference to arbitration, of which plaintiffs had had notice before action brought. (4) If held that the claim were not referable to arbitration, a tender of £550.

The plaintiffs excepted to so much of the plea as sought to rely on the arbitration covenant as a condition precedent to suing. Otherwise, that the 3rd plea was vague and embarrassing, as not sufficiently disclosing whether defendants did seek to rely on the 15th condition of the policy.

Bale, for plaintiffs: The covenant to submit to arbitration is merely a collateral one, and not a condition precedent. The clause in question is very loosely worded, there being

no provision as to the number of arbitrators or by whom they are to be appointed. This court cannot appoint arbitrators or compel arbitration proceedings. The policy Johnston & contains no provision either that the sum to be paid shall Commercial be an amount to be ascertained by arbitration, or that no Union Assuraction shall be maintainable until the amount of loss has anoe Co. (Ld.) been ascertained. In such cases there would be a postponement of judicial proceedings (Scott v. Avery, 2 Jur., Pt. 1, N.S., 815; Horton v. Sayer, 26 L.J., N.S. Exchq. 28; Elliott v. Royal Exchange Insurance Corporation, 2 Exchq. 237, Dawson and others v. Fitzgerald, 1 Exchq, N.S., 257; Edwards v. Aberayron Mutual Ship Insurance Society, 1 Q.B.D. 563; Trainor v. Phoenix Fire Insurance Company, 8 Times L.R., Pt. 2, p. 37; Kenworthy v. Queen Insurance Company, ibid, p. 211; Scott v. Corporation of Liverpool 28 L.J., N.S. (Chan.) 236; Russell on Awards, p. 60; Porter on Insurance, p. 209; Izard v. Colonial Government, 7 N.L.R., 159; Schmidt v. Francke, 1 Menz., 334; Davies v. South British Insurance Company, 3 Juta, 416).

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Morcom, A.G., for defendants: Scott v. Avery, (vide supra) is still the leading case, notwithstanding the tendency of more recent decisions to "fritter away" the tendency of more recent decisions to "fritter away" principles therein laid down. An agreement to submit to arbitration is in all cases a condition precedent. Elliott v. Royal Exchange Insurance Corporation (vide supra) also governs the present case, as there the condition was similar. WRAGG, J.: Do you contend that, under the 15th condition, the plaintiff would be bound, as to amount, by the award of arbitrators? Undoubtedly. The plaintiff could only sue for the amount of the award, as to which the arbitrator's finding would be conclusive. The contract between the parties evidently contemplated the reference of disputes, in the first instance, to arbitration. Recent English legislation has given effect to former proceedings by way of demurrer (The Arbitration Act, 1889; Baker's case, Q.B.D., 1892, 144). [He also cited Shepstone v. Graves, 3 N.L.R. (Nov.), 13; Viney v. Bignold, 20 Q.B.D., 172.]

Bale, in reply.

WRAGG, J.: The 15th clause of the conditions is drawn in vague and general terms and does not, in my opinion, contain any words which oust the jurisdiction of this Court, or which estop the plaintiff from bringing an action for the amount which he claims under the policy of insurance. This 15th clause appears to me to amount to a collateral covenant only and not to be a condition precedent to the right of maintaining an action,

March 10,

The plaintiff's exceptions ought to be sustained, costs to be costs in the cause.

Johnston & Moulton v. Commercial Union Assurance Co. (Ld.)

GALLWEY, C. J.: This is an action for the recovery of £950, in respect of loss or damage sustained by fire, under a policy which is attached to the declaration, and the question raised on the exceptions is, shortly, whether the insurers can compel the insured to proceed to ascertain by arbitration the amount of the damage so sustained. is of course a very different matter from staying proceedings, which, in the absence of provisions similar to the Imperial Arbitration Act, 1889, is unknown to this Court. concur in the view expressed by Sir Walter Wragg, that it is competent to the plaintiffs to proceed as they have done, by action in this Court. All the English authorities cited, as well as Davies' case (vide supra), show agreements between the parties to take certain steps to ascertain the amount for which an action is to be brought; in the present case, however, there is no such covenant. The 14th condition of the policy provides that when loss has been "duly proved," the Company shall, at their option, either pay the amount, or rebuild, repair, or replace the insured property. I think the expression, "duly proved" indicates the proceedings referred to in the 12th condition for notifying the Company of loss, and stating and verifying the amount claimed. The 15th condition is a bare covenant to proceed to arbitration, and I cannot hold that it is sufficient to stay In Davies' case (vide supra) there was a further the action. condition setting forth the manner in which the amount of loss was to be ascertained, in other words, that the arbitrators should, in a particular way, fix the amount to be paid by the Company, and that the latter should only be liable to that extent. We cannot, however, import into the covenant now before us the words in Davies' policy, or words to a similar effect. The exceptions should therefore be sustained, costs being costs in the cause.

TURNBULL, J.: I regret that I am unable to concur. The 15th clause of the conditions attached to the policy is certainly general in its terms, though I do not go so far as to consider it "vague." The arbitrators are to be "indifferently chosen," which may mean "chosen in the usual manner," though the expression is rather a loose one. As to the provision that the award shall be "conclusive," that does not oust the jurisdiction of this Court. It simply means that the award shall be final as far as it goes, and its effect would only be to delay the exercise of such jurisdiction. With reference to Trainor's case and Ken-

worthy's case (vide supra), apart from English statute law, which of course does not bind us here, the principles therein laid down—especially in the former case, where they are Johnston & Moulton v. very exact—commend themselves to me. It is true that in Commercial Trainor's case (vide supra) the policy distinctly provided Union Assurthat arbitration should be a condition precedent, but it is not certain that there was a similar condition in Kenworth's case (vide supra), in which the Lord Chief Justice and Mr. Justice Collins were strongly opposed to "frittering away " the decision in Scot v. Avery (vide supra). present case, I regard the 15th clause as a condition precedent, and I cannot see why this Court should be unable to enforce an agreement to submit to arbitration in the same way as it can enforce the performance of any other contract. It appears to me that in commercial questions this Court would be greatly aided, and the dispatch of business would be facilitated, if we were more frequently assisted by arbitrators.

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GALLWEY, C. J.: I forgot to cite the case of Collins v. Locke (4 App, Cases, 674.

Per curiam: The exceptions upheld. Costs to be costs in the cause.

[Plaintiffs' Attorneys: H. BALE & WYLIE. Defendents' Attorney: HARRY ESCOMBE.]

In re THE TESTATE ESTATE OF CATHERINA HELENA WILHELMINA WICHT.

1892. Jan. 22 March 10.

In re Wicht.

Executor Testamentary. Power of foreign executors to act in Natal.

The Court will not authorise executors testamentary in the Cape Colony to transfer land in Natal. The Master authorised to appoint a fit and proper executor dative in Natal.

January 22nd, 1891. In banco.

This was an application for an order authorising the Registrar of Deeds to transfer a certain piece of land in Natal to three purchasers thereof, under a power of attorney granted to John Goodliffe, of Durban, by two of the directors of the Capetown Board of Executors, in their capacity of executors testamentary of the late Catherina H. W. Wicht. There was also an application for an order authorising the issue of certified copies of the deed of grant and diagram of the land in question. The Capetown Board of Executors were by the testatrix's last will appointed executors and administrators of her estate, guardians of her minor children, and fidei commissary heirs. The will had been proved in this Colony. The land in question was the only asset in Natal.

Pitcher moved for an order as indicated above. He referred to in re Wood (11 N.L.B., 235). [Gallwey, C. J.: I am not prepared to allow executors in the Cape Colony to administer an estate in this Colony. Natal executors are not so authorised in the Cape Colony. In Wood's case (vide supra) I reserved my. objections. The distinction between executors and trustees is illustrated in Stewart v. Norton and Others (14 M.P.C.C., 17). We have authorised foreign trustees to act here.] In re Peel (not reported, 22 Nov., 1888; In re Nall, N.L.R., 1872, p. 29).

Postea, March 10th, 1892. (In banco.)

Pitcher renewed the application, citing in re Lidgett, 9 N.L.R., 79; in re Ross, 7 N.L.R., 73. He suggested that the Court might regard the Board of Executors as trustees, in respect of their nomination as fidei-commissary heirs

Per curiam: The application refused. The Master authorised to appoint some fit and proper person or persons as executor or executors dative of the estate in Natal.

[Applicants' Attorney: W. E. PITCHER.

ELYSEE DE ROQUEFRUIL LABISTOUR (Plaintiff) v. JAMES AKERMAN POLKINGHORNE (Defendant) [The Plaintiff Applicant.]

March 11. Labistour v. Polkinghorne,

New Trial. Jury Law, 1871. Assault, Ground of too small damages.

Refusal of application for new trial of action for damages urising out of an assault, on the ground that the damages were too little when compared with the evidence.

(In banco.)

This was an application for an order granting a new trial of an action between the parties heard before the Acting Magistrate of Durban and a jury on the 11th of January, 1892, wherein the plaintiff claimed £100 as damages for an assault committed on him by the defendant. The jury awarded 1s. damages and the magistrate gave judgment accordingly, and ordered each party to pay his own costs. There had been a tender of £5 before action brought. The grounds for the application were (1) That the verdict was manifestly against the law, the evidence, and the legal instructions of the Court. (2) That the damages found by the jury were far too little when compared with the evidence. The facts were not materially in dispute.

Goodricke, for plaintiff, cited Addison on Torts, 5th Ed., p. 78. He argued that the jury should not have found for an amount smaller than the tender (Orocker v. Doig and Murray, 1 N.L.R., 111). [Gallwey, C.J.: It was a question for the jury whether the sum paid into Court was a right amount]. The magistrate disagreed with the verdict, and that should weigh with the Court (Hall v. Lawrence, 8 N.L.R., 178; Hill v. Wallace, 1 Menz. 347.) The verdict was unreasonable and should therefore be set aside. (Phillips v. Martin, 15 App. Cases, 193; East v. White, 12 N.L.R., 179; Sonnenfeld v. Randles Bros. & Hudson, ibid. 82; V. Naidoo v. Chinniken, ibid, 62).

Morcom, A. G., for defendant: The assault was unpremeditated and trivial; there was provocation; an apology was offered, and a tender made and refused. The jury considered all these circumstances, and found is damages. As to the effect of the presiding judge's concurrence, Solomon v. Bitten, 8 Q.B.D., 176, modified by Metrop. Dist. Ry. Co. v. Wright (11 App. Cases 152), and by Webster v. Friedeberg (17 Q.B.D., 736) are in point. In an action for assault or defamation, a tender is not binding.

Goodricke, in reply.

GALLWEY, C. J.: In this case no personal injury has resulted from the assault, only the indignity of the blow, which was a very light one. I have recollected the case of Kelly v. Sherlock (1 Q.B., 686), in which an abusive libel was proved and the jury gave a farthing damages. His Lordship read a portion of Lord Tenterden's judgment]. There is also the case of Forsdike v. Stone (4 C.P., 607), where one shilling damages was given for an atrocious slander. In that case, Mr. Justice Willes—whose judgments are always received with great respect—in giving judgment remarked: "The jury do not appear to have misconducted themselves; there does not appear to have been any compromise among them leading to a verdict clearly inadequate; in a case of slander a jury considers not only what the plaintiff should receive, but what the defendant should pay." A new trial has been granted, and damages have been increased in a case where a professional man had been injured and where the jury appeared not to have taken account of special damages arising from the inability of the plaintiff to attend to his profession. In the present case, however, no special damages are claimed nor is any special injury shown, and I am of opinion, that the judgment and finding of the jury should not be disturbed, as I see no ground upon which to dissent from it.

Wracc, J.: I think that the jury might reasonably have awarded higher damages. Still, there were seven gentlemen on the jury, and they found for 1s. damages by a majority of 5 to 2. For anything I know, they may have thought that the assault was directly provoked by the plaintiff's bad language, and, in that case, I should not be prepared to find fault with their assessment of damages. They are the judges of the evidence, and I am not disposed to quarrel with their verdict.

TURNUBLL, J.: I concur.

Per curiam: The application refused, with costs.

[Plaintiff's Attorneys: DILLON & LABISTOUR. Defendant's Attorney: W. E. SHEPSTONE.]

March 11.

Orown Lands. Land purchased from Government on system and of yearly payments. Authority to Mortgage. Consent.

Authority granted (but subject to Surveyor-General's consent to the form of bond) to pass notarial bond over applicant's interest in Crown Lands, purchased on terms of extended payment and held under provisional certificate of sale and purchase.

(In banco.)

Boshaff, for the executors dative, moved for authority to pass a notarial bond over certain property belonging to the above estate, including its interest in a piece of land purchased from the Crown partly paid for, and held under a provisional certificate of sale and purchase, with the object of paying off certain liabilities.

GALLWEY, C. J.: We can grant the application, subject to production to the Registrar of the Surveyor-General's consent to the form of bond.

WRAGG, J.: If there should be any difficulty in obtaining the consent, the applicant can come here again.

Per curiam : Order accordingly.

[Applicants' Attorneys: Boshoff & Coldridge.

In re EVETT SAUNDERS.

1892. March 14,

Practice. Reference to Master. Prima facie grounds. In re Saunders Minor's Interests. Sale of land held in trust for minor.

The Court will not order a reference to the Master for a report upon an application for authority to sell land held in trust for a minor, unless such application 1899. March 14. In re Sannders be supported by affidavits showing prima facie grounds for the order sought to be obtained.

(In banco.)

This was an application, on behalf of Evett Saunders, for an order authorising the transfer of Lot 53, Murchison Street, Newcastle, sold by him as trustee of his minor son, Evett Edward Saunders.

The land in question was registered in the applicant's name, in trust for his minor son, and had been sold by him. without the authority of the Court. The Registrar of

Deeds, however, declined to pass transfer.

The applicant stated that the purposes of the trust had not been defined; that the land had been bought by him with his own money, and though nominally placed in trust was virtually his own property; that the property was not mortgaged, and that the price was a fair and reasonable one.

Bale, for the applicant, asked for a reference to the Master, for a report as to the sufficiency of the price.

GALLWEY, C. J.: It is an extraordinary thing for a father to assume that he has a right to transfer the property of his son.

WRAGG, J.: We refused a similar application on the case of *In re Fisher* (12 N.L.R., 19). I do not see any use in ordering a reference to the Master, when so great a departure from our ordinary procedure is sought by the applicant.

TURNBULL, J.: I am opposed to making any order.

GALLWEY, C. J.: No grounds, such as would justify a reference to the Master, have been shown. In the absence of an affidavit disclosing *primâ facie* grounds, no order can be made.

The application was withdrawn.

[Applicant's Attorneys: Anderson & WATT.]

In re THE DRUID SYNDICATE (Ex parte Hosken).

Syndicate. Winding-up. "Company," within the meaning in re The of sec. 1 of the Winding-up Law of 1866.

SyndRate.

- A Syndicate, established for the purposes of acquiring mining property with a view to developing the same and disposing thereof at a profit by the formation of a Company; managed by a committee of 5 of its members vested with "full control of all the affairs of the syndicate" save as limited by express resolution of the members, three to form a quorum; having also an agreement of association signed by the members; a capital divided into shares, transferable with the approval of the Committee, but not divisible; with a share register, an office. a bank appointed for its funds, having a secretary; and rules as to meeting and voting; the liability of members being limited to the balance unpaid upon shares. HELD (GALLWEY, C. J., dissentients) not to be a "Company" within the meaning of the definition in sec. 1 of the Winding-up Law of 1866. An application for an order for winding-up the affairs of the syndicate, therefore, refused.
- Per WRAGG, J.: That the decision in the British Reef Company (8 N.L.R., 151 & 157), was not conclusively affected by this judgment.
- Per TURNBULL, J.: That the fact that a syndicate had failed to carry out its special object of developing and disposing of its property and forming a future company, distinguished it from the "existing" Company on which the decisions in Heyman v. Brunskill (8 N.L.R., I30) and the British Reef G. M. Co., ibid. (151 & 157) were arrived at.
- Per GALLWEY, C.J., dissentiente: That, following the decisions in the last-cited cases, such a syndicate was a "Company" proper for winding up, being managed by a Committee with all the powers of directors, and, as distinguished from an ordinary partnership, coming within the scope of the Winding-up Law of 1866.

Margh 1 & In re The Druid Syndicate.

March 4th, 1892. (In baseo) before GALLWEY, C.J. and TURNBULL, J.

Laughton, presented the petition of William Hosken, a creditor and member of the above-named syndicate, for an order winding-up the affairs thereof.

Greene, for certain members of the Syndicate, raised the question as to whether the syndicate was a "company" proper for winding-up, within the meaning of sec. 1 of the Winding-up Law of 1866. He cited in re The Venus Ideveloping Syndicate (12 N.L.R., 47), in which the point had been raised but not decided, and the British Reef G. M. Co. (8 N.L.R., 151, 157), the latter being, he contended, distinguishable, there being provisional directors.

Laughton, in reply: The Winding-up Law is intended to meet the case of an association—either a company or a syndicate—with capital divided into shares held by members, and having its affairs managed by a representative body, not necessarily styled "directors." The word "Director" means nothing more than a "Superintendent" (Warton's Law Lew.). [He cited also The British Reef G. M. Co. (vide supra) and Heyman & Co. v. Brunskill (8 N.L.R., 130].

Greene, in reply, cited Palmer's Company Precedents. 3rd Ed., p. 56.

Postea, March 14th, 1892. (In banco.)

Laughton renewed the application, citing Smith v. Anderson, 15 Chan. Div., 247; Buckley on the Company Acts, pp. 376, 442; Dwarris on Statutes, p. 550 et seq.

Greene, in reply: The Committee of Management was not "elasted by the shareholders" as required by sec. 1 Law 19, 1866, but only by a few persons coming together to form a syndicate. The intention of the parties should be taken into account, as in the British Reef Ca. (vide supra). The powers of the Committee were not similar and were much more extensive than those of directors, the latter being invariably limited by the Articles of Association.

Laughton, in reply: The Court is concluded by the British Rang case (vide supra).

WRAGE, J.: My remarks in the previous cases, the British Reef Gold Mining Company, the Venus Developing Syndicate, and the Meath Gold Mining Company, shew Is The Druid that I have never been able to hold that syndicates of this Syndicate. description come within the meaning of the term "Company" in the 1st section of our Winding-up Law of 1866. I am unable, after argument in the present application, to change or modify those expressed opinions, to which I strongly adhere.

I cannot, further, assent to the proposition that a committee of a syndicate of this description is the same as a board of directors of a company within the meaning of the

same section.

Therefore, without saying one word about the merits of Hosken's claim, I would refuse this application to wind up this syndicate under the Law No. 19 of 1866.

TURNBULL, J.: At first sight, it might appear that the Court was concluded in this case by the judgment in the British Reef Company (vide supra), but I consider that there is a marked distinction between that Company and this syndi-The British Reef Company, as appears from the case of Heyman v. Brunskill (vide supra), had been considered an "existing company"; and, in the order for winding it up, which was afterwards granted, the late Chief Justice, Sir Henry Connor, so regarded it; and held that there was no alternative but to grant such an order. In my opinion, it was the intention of the shareholders of the British Reef Company to form, and the late Chief Justice considered that they had formed a "company" within the meaning of section 1 of the Winding up Law of 1866. I agree, so far, with Mr. Laughton, that a syndicate may be such a company, and that its committee of management may in some cases be regarded as directors, but the question that we have to consider is whether the Druid Syndicate in particular is such a company, and I think not, for the following reasons:—The Committee contemplated to be appointed under the deed of agreement was appointed for a certain purpose, that is, to develop the property and to dispose of it to advantage. They had not, however, to carry on any such business as is indicated in the Winding-up Law of 1866, sec. 5. sub-secs. 7th & 9th. Again, the agreement of association of this Syndicate contemplated the formation of a company, but this object was not fulfilled. For these reasons, I consider that the present case is clearly distinguishable from that of the British Reef Company (vide supra), and I am accordingly not in favour of granting the application fer a winding-up order.

March 4 & 14.

In re The
Druid
Syndicate.

GALLWEY, C. J.: I am unable to concur with the other members of the Court. In my opinion the word "company" was introduced into the Winding-up Law of 1866 in order to distinguish between what ought to be called a company and what should be considered a partnership, taking into account the technical differences between these terms, the broad distinction being that in the case of the former the shares are transferable, which is not so in a partnership. The persons in the present instance formed themselves into an association which they called "The Druid Syndicate." They prepared and executed certain articles or memoranda of association, which in every possible way distinguished the venture from a partnership. The shares were declared to be transferable, but not divisible; there was a share register; an office was established; a bank selected; a secretary appointed; a committee of management nominated; it was provided how the votes of shareholders should be taken, and how a quorum, of shareholders and of the general committee, should be constituted. It was declared that the chairman and secretary were to be the parties to sue and be sued on behalf of the syndicate; and finally it was stipulated that the acts of the committee were to be binding upon each individual shareholder.

Now, from the report of the British Reef Company (vide supra), it will be seen that, there, no shares were in existence, and that, therefore, that was not a company "divided into shares." In the present case, however, there are shares, and there is also a provision for their transfer, and on this ground it seems to me utterly impossible to disregard the decision in a case not nearly so strong as the present case.

Whether a syndidate is managed by a committee—there is no great charm or force in the word "director"—the question appears to be whether the persons appointed had not, in fact, powers extending even further than those usually exercised by directors.

I now come to an essential point, and it is this:—What is the scope of the Winding-up Law? Is it not that where there are shareholders in an association which is unable to pay its debts, there shall be a process for winding-up without any distinction between the shareholders, and without recourse to the alternatives, the one to proceed against each individual shareholder, the other to liquidate by the process of insolvency? But, by the decision of the Court just given, the process specially created for the winding-up of companies with transferable shares is declared to be no longer available, but the rights of shareholders will have to be decided by the terrible process of insolvency, under which

the individual estates of shareholders may be held liable for 1892.

March 4 & 14.

the debts of the association.

When I contrast the provisions in the articles of associa- In re The tion of the Druid Syndicate with those of the British Reef Syndicate. Company, how much more do the former fall within the scope of the Winding-up Law! I consider that I am concluded by the cases of Heyman v. Brunskill and the British Reef Company (vide supra), in which it was held by the Court that the Winding-up Law applied, from ruling otherwise in the present case.

I will follow Sir Walter Wragg in saying nothing as to the merits or demerits of the application, nor will I remark upon the consequences of any proceedings in insolvency, or how far an execution under a judgment could be re-

sorted to.

WRAGG, J.: I only wish to point out, further, that no conclusive judgment, affecting the decision in the British Reef Company's case (vide supra), has been pronounced in the present case. I have again, as on three former occasions, expressed dissenting opinions upon the question involved in the judgment of the Court in the earliest case; I understand that the Chief Justice now upholds that decision and that Mr. Justice Turnbull regards the cases as distinguishable.

Per curiam: The application refused.

[Applicant's Attorneys: LAUGHTON & TATHAM. Respondents' Attorney: HENRY BALE.

In re The Insolvent Estate of Robert Thomas Haynes.

March 17. In re Haynes.

Trustee's Remuneration. Delay in Filing Insolvency. Account.

Trustee's remuneration authorised, though disallowed by the Master on the ground of trustee's failure to file account within the time prescribed by Rule 1 (b) of 20 July, 1875.

(In banco.)

Laughton moved for the confirmation of the Trustee's first and final liquidation and distribution accounts. The

Master had disallowed the trustee's commission, on the ground that the accounts had not been filed within the present reference time.

It appeared that the accounts had been filed in the local magistrate's office and advertised in the Gazette within the time, and that the delay in lodging with the Master was due to inherent difficulties in realising the assets. The accounts were only six days overdue.

Counsel referred to in re Sutton's Estate (12 N.L.R., 276).

Per GALLWEY, C. J.: The Master was perfectly right in disallowing the commission. Under the circumstances, however, it may be restored.

Per curiam: Accounts confirmed. Commission allowed.

[Applicant's Attorneys: Laughton & Tatham.

1892. March 22. ROBERT WINTER EVANS (Plaintiff) v. JOHN ARTHUR PETERS (Defendant).

Evans v. Peters.

Inspection of Documents. Practice.

Inspection of documents consisting of certain letters contained with others in a book, allowed upon the latter being lodged with the Registrar, and the particular letters being specified and identified.

(In banco.)

Pitcher, for plaintiff, moved for an order directing an inspection of the defendant's press letter book containing letters written during four months.

The book in question appeared to be in the custody of the Attorney-General in connection with certain criminal proceedings.

Greene, contra.

WRAGG, J., suggested that the letter book should be lodged with the Registrar, with liberty to plaintiffs attorney to inspect such letters as might be specified and Evans v. identified.

1802

GALLWEY, C. J., after referring to Mackenzie v. Colonial Government (8 N.L.R., 128) intimated that he was prepared to make an order in similiar terms.

Per curiam: The letter book ordered to be lodged with the Registrar. The plaintiff's attorney to be at liberty to inspect and take copies of such letters contained therein as may be specified and identified to the said Registrar. Costs to be costs in the cause.

[Plaintiff, Attorney: W. E. Shepstone. Defendant's Attorneys: GREENE & CARMICHAEL.]

In re DUNCAN STEWART CAMPBELL.

April 2.

Attorney (candidate), admission of. Practice.

In re Campbell

Order for admission of candidate Attorney allowed to date back, the hearing of the petition having stood over owing to press of Court business.

(In banco, before GALLWEY, C. J., and TURNBULL, J.)

Morcom, A. G., presented the petition of the abovenamed

applicant for admission as a candidate attorney.

The application had been set down for the 24th March, but stood over owing to pressure of business. asked that the admission should be allowed to date back to the 30th March, so that the candidate might not lose a term when he came to be admitted as an attorney.

Per curiam: Order for admission, to date back to the 30th March.

In re. THE TESTATE ESTATE OF WILLIAM FLEMING ALLAN.

In re Allan. Banker. Trust money deposited with. Fiduciary capacity of depositor. Withdrawal.

Order authorising payment from a bank of monies deposited by a person (since deceased) in his own name, but to a separate account, such monies having been entrusted to deceased, in a fiduciary capacity, for a particular purpose. [Per Gallwey, C. J.: The principles laid down in Hallett's Case (13 Chan. Div., 696) referred to.]

(In banco) before GALLLWEY, C. J. and TURNBULL, J.

This was an application by Sir Donald Currie, K.C.M.G., for an order directing the executor dative of the above-named estate to pay to him a sum of £1,200 which had been remitted by him to the deceased to be applied to a particular purpose. The negotiations for investment had, however, fallen though, and the money had accordingly been paid by the decased to his account in the Standard Bank, Durban, as a fixed deposit.

The matter stood over from the 17th March, for notice to be given to the Bank, and the Manager now consented

to the order asked for.

In granting the order (which was concurred in by TURNBULL, J.) GALLWEY, C.J., referred to the case of in re Hallett (13 Chan. Div., 696) citing several passages from the judgments therein at pages 709, 717-719 and 752).

Per curiam: Order as prayed.

[Applicant's Attorney: W. E. Shepstone.]

GEORGE WILLIAM NOURSE VARTY (Appellant) v. NIXEN AND UNALI (Respondents).

April 2.

Varty v. Nixen and Unali.

Grass Burning. Fire originating on defendants' land. Summons in Magistrate's Court. What averments necessary in civil action for damages.

In a Magistrate's Court civil summons claiming damages in respect of injury caused to plaintiff by a grass fire alleged to have been lit by "a member of defendants' kraals" in the defendants' gardens, and extending to the plaintiff's farm. HELD: That although such summons need not set forth the names of the persons who actually laid the fire, the capacity in which they acted and the nature of defendants' liability for their acts were essential to the summons, as was also an averment of negligence.

(In banco, before GALLWEY, C.J., and TURNBULL, J.)

This was a review of the decision of the Magistrate of Weenen County.

The plaintiff in the Court below sued the defendants for £50 for and as "that on or about the 16th of September, 1891, a grass fire arose from the gardens of the defendants, being lit by a member or members of defendants' kraals on Mr. Fuhrie's farm near Hlatikulu, which said fire did extend beyond the boundaries of the said farm and into a farm of plaintiff's near Hlatikulu and did burn off all his winter grass, thereby damaging the plaintiff' &c.

The defendants' attorney took exception to the summons on the grounds (1) That the names of the persons who set fire to the grass were not stated, nor whether they were in defendants' employ or acting under his orders. (2) That the summons did not set forth that the alleged act was committed wilfully or carelessly or with the knowledge of defendants. (3) That the defendant Nixen was not decribed in the summons as required by the 2nd Rule of Inferior Courts. (4) That the name of plaintiff's farm was not stated.

The Magistrate upheld the 1st exception specially, and generally held that the summons was too vague throughout.

The plaintiff appealed.

Pitcher, for appellant.

Laughton, for respondent Nixen.

1892. April 2. Varty v. Nixon and Unali.

GALLWEY, C. J.: The summons does not show that any particular member of the defendants' kraal is liable for the fire arising in the defendants' gardens. Must there not be an averment of negligence? Surely, I have a right to burn my grass unless I do so negligently. The summons is silent as to the relationship of the defendants to the persons who actually started the fire. [His Lordship referred to cases decided in the Cape Colony and in Mauritius, also to Shires v. Smerdon (not reported, 1862) in Natal.] The names of the persons who set fire to the grass are not material, but the capacity in which they acted and the averment that the defendants are liable for their acts are essential to the summons in the present case, as is also an averment of negligence.

TURNBULL, J., concurred.

Per curiam: The application refused with costs. Leave given to plaintiff to amend the summons. Costs of former proceedings in the Court below to be costs in the cause.

[Appellant's Attorney: R. M. K. CHADWICK, Estcourt. Respondent Nixen's Attorney: C. B. COOKE, Estcourt.

1892. April 2. THE INTESTATE ESTATE OF PRIDEAUX SELBY.

In re Selby.

Succession. Presumption of death.

Presumption of death in the case of a person who, if surviving, would be between 70 and 80 years of age; who was believed by members of his family and others to have died unmarried in South America about 50 years since, it appearing that enquiries had been made, but without success, to obtain an official record of death.

(In banco). Before Gallwey, C.J., and Turnbull, J.

This was an application on behalf of the heirs ab intestato of Dr. Prideaux Selby, for an order sutherising the Matter to pay out certain monies deposited with him and standing to the credit of the estate.

The proposed distribution was in accordance with the rales laid down in in re Gledhill (12 N.L.R., 43). The brothers of the deceased having died before him, there being In re Belby. no sisters, the inheritance devolved upon the children of two paternal uncles and one maternal uncle, or their representatives. One of the brothers of the deceased, John Selby, although believed by members of the family and others (including the family solicitor in London) to have died unmarried, about 50 years ago, at Valparaiso, while travelling with one Thompson, had not been heard of, nor was there official record of his death obtainable, notwithstanding enquiries made in several directions. It did not appear to have been the practice at the time of the deceased's supposed death to preserve records of death in the Consular offices, and the archives of the British Consulate at Valparaiso were totally destroyed by fire in 1866. The date of birth of the supposed deceased was not known; it appeared, however, to have been prior to 1818.

Morcom, A.G., for the applicants, read exhaustive affidavits and proofs furnished therewith, and submitted that the death of John Selby might reasonably be assumed.

GALLWEY, C.J., after remarking upon the great care with which the evidence had been prepared, observed that it appeared to him that no injustice would be done by ordering the distribution of the estate as if John Selby were dead, which fact, under all the circumstances, the Court was bound to assume.

TURNBULL, J., concurred, attaching great weight to the evidence received from disinterested parties as to the probability of John Selby's death.

Per curiam: Order authorising the Master to pay to R. F. Morcom, as agent and attorney of the heirs ab intestato, the amount deposited to the credit of the estate.

[Applicants' Attorney: R. F. Morcon.]

April 12. Goolam v. Bobbert.

ISMAIL GOOLAM (Plaintiff) v. THE ESTATE OF MAHOMED BOBBEET (Defendant).

Insolvency. Creditor's petition.

Order for sequestration on a creditor's petition refused, the debtor being dead and there being no executor of his intestate estate.

(In camera). Before GALLWEY, C.J.

Cameron presented the petition of Ismail Goolam, praying for the compulsory sequestration of the intestate estate of Mahomed Bobbert, deceased.

GALLWEY, C.J.: The debtor is dead, and there does not appear to be any executor of his intestate estate. Upon whom can a summous be served? The Law (sec. 14) makes provision for summoning an absent debtor, but there is no procedure to meet the case of a deceased person without legal representatives.

(The application stood over sine die.

[Applicant's Attorneys: Hathorn & Mason.]

April 12.
Adley v.
Hatley.

SYDNEY HERBERT ADLEY (Plaintiff) v. JOSEPH HENRY HATLEY (Defendant).

Judicial sale. Place of sale. Practice.

Subject to consent of parties, judicial sale of immovable property authorised to be held on the auctioneer's premises at Newcastle, the property being situated in that borough.

(In camera). Before GALLWEY, C.J.

Cameron, for the plaintiff, moved for an order authorising the judicial sale of certain landed property situated at Newcastle, to be held at any place in Newcastle or Ladysmith

which might be agreed upon by the parties.

April 12.

The 44th Rule of Court, amended by Rule of the 1st Adley w. October, 1866, directed such sales to be held "in the Courthall or upon the premises," or "at any place in Pietermaritz-burg or at Durban which shall be specified in the advertisement by the Master."

GALLWEY, C.J.: I do not see how I can extend the Rules of Court, but there may, I think, be an order authorising the sale to take place at the auctioneer's premises in Newcastle, if the parties so agree.

Order accordingly.

[Applicant's Attorneys: Hathorn & Mason.]

In re The Testate Estate of John Lambe Rigden.

April 12.

Ourator bonis. Sale of movables.

In re Rigden.

Curators bonis authorised to sell the furniture of an unoccupied house, as being perishable property, to provide funds for payment of debts.

(In camera). Before GALLWEY, C.J.

Bale moved for an order authorising the curators bonis appointed in this estate (vide 12 N.L.R., 353) to sell the household furniture and effects in the house of the deceased. Until lately, the premises had been let furnished, but they were now vacant. There were debts requiring to be paid. The curators had already authority to sell "perishables."

GALLWEY, C.J.: I suppose household furniture in an unoccupied house may be regarded as "perishables." The order may be granted.

Order accordingly.

[Applicant's Attorneys: Bale & Greene.]

[IN THE DURBAN CIRCUIT COURT.]

1892. February 16. April 12.

Mitheram and Toteram v. Castle Mail Packets Co.

MITHERAM AND TOTERAM (Plaintiffs) v. THE CASTLE MAIL PACKETS COMPANY (Ld.) Defendants). The Plaintiffs Appellant.

Carrier by sea. Passengers' luggage. British Ship trading to Natal from foreign port. Lex loci solutionis. Contents of packages. Evidence.

In an action in respect of loss of passengers' luggage from a British ship voyaging from a foreign port to Natal, there being no evidence of any special written contract, Held: That the common law of the Colony was applicable, the loss being held to have taken place, at the termination of the voyage, and in the inner harbour of Natal.

The evidence of the owner of a package which had been broken open held to be good evidence against the defendants as to the true value of goods abstracted therefrom, it appearing that such valuation had been as fairly estimated as was possible under the circumstances (maxim; omnia præsumuntur contra spoliatorem).

(Before TURNBULL, J.)

The facts of this case will sufficiently appear from the following statement of grounds for judgment transmitted on the 12th April, 1892:—

Wylie, for plaintiffs. Binns, for defendant.

Turnbull, J.: This matter came before me at the February Durban Circuit in review of the decision of the acting Resident Magistrate of Durban, in a case where a sum of £95 11s. was claimed by the plaintiffs, as the value of certain two boxes and certain contents thereof belonging to the plaintiffs; which boxes the plaintiffs alleged that the defendants had contracted and agreed to carry safely from Delagoa Bay to Durban by the "S.S. Melrose," but by reason of the refusal and negligence of the defendants to deliver or to allow the plaintiffs to take possession thereof, the said boxes were broken into and certain of their contents abstracted, to the value aforesaid whilst in the custody of the defendants.

The case came before the Magistrate at Durban for hearing on the 13th November, 1891, when the defendant entered a plea of not indebted, and after several adjournments the Magistrate on the 7th January, 1892, gave judg-Toteran v. ment for the defendants with costs.

In reviewing the case we have to consider—

(1) What was the nature of the contract?(2) By what Law should the case be decided?

(3) Did the plaintiffs sustain any loss, and if so, how?

(4) What, if the plaintiffs sustained loss, is the amount of that loss to be appraised at?

First then, as to the nature of the contract; a document stated on back thereof to have been printed at the "Caxton office, School Lane, Durban," and purporting to be a form (with blanks) of a "Third Class Passage Ticket" was put in at the trial before the Magistrate, and in the evidence is referred to by Mitheram as being like the one he got at Delagos Bay, and which the people on the ship got back from him; but as this form of Third Class Ticket purported on its face to be issued at the "Natal Agency, Durban," to secure a passage from Natal to some unmentioned place; and none of the several blanks left in the form for essential particulars, were filled in with such particulars, it was impossible for me to recognise and admit such a document as of any value as evidence; the more especially as the plantiffs who embarked on the steamship "Melrose" at Delagoa Bay in Portuguese territory paid £2 10s. for their passage as deck passengers, and afterwards entered into a further agreement with the steward of the ship that on paying 80s. more they should be allowed a cabin below deck, into which the plaintiffs carried one of the boxes hereinafter referred to, which contained the most valuable of their effects.

To my mind, therefore, as there is no evidence that any document was ever signed by either of the plaintiffs, or that any printed and written matter was ever read or explained to them, the defendants occupied, as regards the plaintiffs, either the position of common carriers under English law, if the common law of England were to rule the case; or a position analagous to that of the conductor under Roman Civil Law, under an agreement for hire of services, known as a locatio conductio operarum, if resort were to be had to the Law of Natal.

As to determining by what Law the case was to be decided, I had some difficulty; but I at last came to the conclasion that it must be ruled by our own common law, for reasons hereinaster to be given; although I am inclined to think that under the particular circumstances of the case it

1892. February 16. April 12. would make no material difference whether it were decided either by the common law of England or the common law of Natal.

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I am of opinion that the law of the flag as it is termed, which in this case would be the common law of England qualified by certain statutes passed between the years 1734 and 1862 inclusive, including therein certain of the provisions of the English Carriers' Act (11 Geo. IV. & 1 Wm. IV. c. 68), which are very generally imported into the conditions printed on passage tickets, does not apply in this case.

My reasons for so determining are as follows: the plaintiffs, although British Indians, were unable to read a document in the English language whether it were printed or written, and as already stated there is no evidence that plaintiffs ever signed any contract or document of any kind, and although Mitheram speaks English well, there is no evidence that any special conditions as to their luggage were ever read or explained or otherwise communicated to either of them—in fact, Mitheram distinctly denies that the ticket referred to was ever read or explained to him; and, further, they embarked at a port in a foreign territory to proceed to a port in another territory in a ship belonging to another country, and although the parole agreements were entered into in a Portuguese territory, the Portuguese law, the lex loci contractus, could never have been intended to be the law to rule between the parties.

On the other hand, I have come to the conclusion that the lew loci solutionis, the law of the place of final performance of the agreements, must rule this case, according to the maxim contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit (Dig. 44.7.21), and, therefore, our Common Law in Natal, which is the Roman Dutch Law as administered in the legal tribunals of the Cape Colony in the year 1845 (Ord. 12–1845) must be resorted to, as our local statute law regarding shipping has made no provisions

for such cases.

The necessity of having recourse to our own law in connection with agreements between passengers and shippers with reference to the luggage of the former, was not overlooked by our late Chief Justice, Sir Henry Connor, for in his judgment in Reynolds v. D. Currie & Oo. (N.L. Reports, 31 March, 1875), having remarked that he was not certain that the Privy Council in their decision in Shand's Oase (3 Moore's P.C.C., N.S., p. 272) meant their ruling as to the application of English law in similar cases, to go further than the express contract then before the Council; His Lordship added: "I make this observation because I think we can understand something taking place in Natal waters

connected with the luggage which might have to be decided by February Natal Law," stating at the same time that that law was to

be found in Dig. 4.9. (Pothier. ad. Pand, 4.9.8.)

Again, JUSTICE WILLES who delivered the judgment in Totoram e. Exchequer in the case of Lloyd v. Giubert (L.R., 1 Q.B. ex Castle Mail p. 126), upholding the format delivered the property of the format delivered the form p. 126), upholding the former decision of the Court of Queen's Bench (Vol. X. Jurist, pt. 1, N.S., p. 949) referring to certain incidents connected with a ship carrying out the services for which it had been chartered, said, "it seems impossible to exclude the Law of England, or even that of Hayti from relevancy in respect of the manner of performing that portion of the service contracted for which was to be rendered in their respective territories; because the ship must needs for the time being conform to the usages of the port where she is." Although in that case, it was held in respect of a contract of affreightment that the law of the flag, i.e., of France, the country to which the ship belonged, where there was no provision to the contrary, was to be taken to be the law to which the contracting parties had submitted themselves.

When, therefore, in the present case, we consider that the loss of the property of the plaintiffs took place at the termination of the voyage, and in the inner harbour of Natal, when the "Melrose was at the wharf taking in the cargo of the "Courland," which had been disabled; it seems to me to be just one of those cases which our late Chief Justice must have had present to his mind in the case above quoted; and, further, the present case is I consider one of those cases which, as already mentioned, are referred to in the judgment delivered by Justice Willes in Lloyd v. Giubert. The parole agreement in the present case implied an agreement between the plaintiffs and defendants that the persons and luggage of the plaintiffs should be safely transported by the defendants from Delagos Bay to Natal in consideration of certain money payments, and so far the agreement was carried out and fulfilled by the defendants, but after the vessel's arrival at Natal, the defendants by the acts of their servants refused delivery to the plaintiffs of their luggage, and allowed certain of the luggage to be stolen. In proceeding to ascertain whether or not the plaintiffs sustained any loss, and if so, how was that loss occasioned? I may state that after carefully perusing the notes of evidence, I differ with the learned Magistrate as to the plaintiffs not having proved their case; and although the Magistrate had the witnesses before him, I attach less weight to the evidence of the fore cabin steward Smith, who was called by defendants' counsel than to the evidence of the plaintiff Mitheram which to my mind was not only corroborated by



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the evidence of the witnesses, Zeeman, Toteram and Paul; but also to no small extent by the evidence of Mr. Watfield, the chief clerk to the defendants' company in Durbau, who, with Smith, was examined on behalf of the defendants.

From the evidence noted down by the Magistrate, I was satisfied that the plaintiffs were prevented by the ship's servants from taking with them the smaller box which was thus left in the cabin when the plaintiffs were ordered out of the steamer about 9 o'clock on the night of their arrival at Durban; and as they were physically unable to carry by themselves the larger box when hurried out of the vessel, they had to leave it on deck, and on their return to the steamer the next morning, they found both their boxes had been broken into, and in addition to missing 45 sovereigns and some £12 or so in silver, they discovered that a quantity of the most valuable contents of the boxes had been abstracted and removed.

As therefore by Roman Dutch law, if a carrier by sea or an innkeeper receives from any passenger or traveller who pays for the conveyance or shelter of himself and luggage, any locked box or sealed bag, and the passenger or traveller on claiming back the box or bag, finds it visibly tampered with; the oath of the passenger or traveller is to be believed as to any missing contents of the box or bag, against the oath of the carrier or innkeeper (Vost. IV., 9, sec. 8), and our law following the jurisprodence of Holland in such cases, treating carriers by water as subject to the same duties and obligations as innkeepers (Burge on Colonial Law (Juta) chap. xix., secs. 2 and 5); and as the plaintiff Mitheram at once on discovering his less made out from memory an inventory of the missing things, when he found that the account books containing the full particulars of such missing property had also been abstracted from his boxes; I consider that his sworn testimony as to such missing property, and its value, which he stated were the cost prices at Zanzibar; should be received as good evidence against the defendants whose servants and agents were responsible for the safe custody of the property that had been stelen from, or lest to, the plaintiffs by reason of their detention of it on board the steamer after its arrival at the wharf. As regards the accuracy of this list made out from memory by Mitheram there is the evidence of Mr. Paul, the clerk and Indian interpreter of the Magistrate's Court, who went through the contents of the two broken boxes with the plaintiff Mitheram, comparing them with the list, and even finding in the boxes some articles that were not mentioned in the list; Mr. Paul also stated that as far as the clother

were concerned he considered that the price values put upon

them by Mitheram were reasonable.

It is also to be borne in mind that after Mitheram had Mitheram and seen his broken boxes and had declined to remove them Toleram v. from the steamer in case he might by so doing lose his Castle Mail Packets Co. remedy against the defendant Company, he subsequently returned to the "Melrose" with Mr. Zeeman, a clerk to the firm of Messra Bale & Wylie, Solicitors, Durban, with the object of making further enquiry into the matter, but they were informed that the boxes were not then on board the steamer, and were referred by a Mr. Nicholl to the Company's agent, Mr. Tyzack, who told them to look for the boxes at the Custom House, which they did, as also at the wharves and sheds, but without finding them; and from that time (the 19th September, 1891) until the case came before the Magistrate for trial on the 4th December, 1891, the boxes remained in possession of the defendants, who tied up the smallest box with a rope and fastened the other up with battens; the defendant's clerk, Mr. Watfield, explaining that this had been done by way of safety, as the little box had been broken open. He further said that it had been the intention of the defendants to keep this box till it was called for. It does not appear where the boxes were when the plaintiffs applied for them on the 19th September, 1891, nor where the defendants had kept them for about 10 weeks.

It is quite apparent that the servants of the defendants acted throughout in a very high-handed manner with the plaintiffs—first, in preventing them taking the small box containing the money on shore, and again by their refusing

to produce the boxes to plaintiffs and Mr. Zeeman.

I am of opinion that the amount of lose as stated by the plaintiff must be accepted as the true value of the loss which they are entitled to have made good to them; as in addition to the fact that this appears, so far as it is possible to ascertain it, to have been very fairly computed, the defendants, by the negligence or tortious acts of their servants, deprived the plaintiffs of the only exact evidence as to such loss which could have been obtained, namely, the books that were abstracted from the plaintiff's boxes, and as every presumption to the disadvantage of the wrong-doers must be adopted according to the well-known maxim, omnia prosumuntur contra spoliatorem, I am satisfied to take the loss sustained by the plaintiffs at the amount claimed in the summons.

As regards the character of the luggage of the plaintiffs for which the defendants were liable, I consider that by our law not only were the plaintiffs entitled to claim for any clothes and provisions taken for daily consumption if the same were lost or damaged by the acts of the defendants or

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their servants (Dig. IV 9.4, sec. 2), but for any loss or damage of their property, whether bullion, merchandise or personal effects, which they carried with them when such loss or damage was occasioned by the neglect or default of the Master or his crew (Van der Linden, Instit. Holland, B. IV. c. 4. sec. 4), who says, "With respect to the baggage which they carry with them, the Master is only answerable when he has taken charge of and stowed it, or when any damage has been occasioned thereto by the fault of him or his crew," as also see Van Leeuwen's Commentaries, Kotze translation, B. IV., c. 2, sec. 10, where it is laid down that "all shipmasters and inn-keepers, although they seem to receive their hire merely for the bare use of their ship or inn, are nevertheless obliged to look after property brought into the ship or inn, and to be responsible for the same. They are not only liable for their own acts (vide Sande, 3.6.9, 1. 27, sec. 9, D. ad L. Aquil) but also for the acts of those whose services they employ, and likewise of those whom they carry and of all those persons who are in their ships;" and Ulpian says (D. 4.9, l. 1, sec. 8): "I think (in such a case) that he undertakes the custody of every thing brought into the ship, and that he is not only liable for the acts of the crew, but also of the passengers." Also, B. IV., c. 39, sec. 3: "So likewise a ship-master and inn-keeper must compensate and make good the damage which the travellers have suffered to property brought into the vessel or inn, and accepted by them, whether the damage be caused by their employées or servants, or even by the other guests or travellers allowed in the ship or inn," and in former times skippers were liable in double the amount for the delicts of their servants (Van der Keesel Select Theses, 811).

This being so as I find—

(1) That there is no proof that there was any written contract between the parties.

(2) That the case has to be decided by the common law of Natal.

(3) That the loss of the plaintiffs occurred through the negligence, defaults or tortious acts of their servants, or of other persons on the defendant's

steamer.
(4) That the value of the amount of loss appears to have been as fairly estimated as was possible under the circumstances of the case; and lastly,

That the plaintiffs were entitled to claim for the loss sustained by them in respect of all property lost which was brought by them on to the steamer, and which was retained in the custody of the servants of the defendants.

I am of opinion that the plaintiffs were entitled to succeed in their claim, and so in consequence I must reverse the judgment of the Magistrate of the 7th of January, 1892, Mitheram and enter judgment for the plaintiff for the amount claimed Toteram v. (£95 11s.) with costs both in this Court and the Court below. Castle Mail

I do not see amongst the items in the account attached to the summons that there is any mention made of the two boxes in question, in the larger of which the box alleged to contain the books of the plaintiffs was kept; this box which contained these books, however, seems to be charged for under the item "Box itself, 15s."

The defendants will be entitled to retain the boxes and property which the plaintiffs declined to take possession of when they discovered the boxes had been broken into and certain of their contents removed, and which boxes, when the plaintiffs afterwards applied for, the defendants unlawfully retained or refused or neglected to deliver to them.

> [Plaintiffs' Attorneys: H. BALE & WYLIE. Defendants' Attorney: W. E. Shepstone.]

(In the Circuit Court for the District of Durban, before the Hon. Sir Walter Wragg).

JOHN HUTTON ATKINSON (Plaintiff) v. THE EXECUTORS TESTAMENTARY OF THE ESTATE OF RICHARD VAUSE December 9. (Defendants).

1891. 1892. April 25.

Auctioneer. Conditions of sale. Special conditions stated Vause's at time of sale. Specific performance. Contract of Executors. sale. Parol evidence. Costs.

In an action for specific performance, it is competent to the defendant to adduce parol evidence to show that a written instrument does not contain the whole of the contract between the parties. This rule of law held to apply to a case in which a special condition as to a servitude had been verbally stated by the auctioneer immediately before a sale of land, such condition being absent from any printed announcement of the sale or written minute of purchase, and denied by the plaintiff, the purchaser.



Decree for specific performance refused, where it appeared that there had been a mistake, and no consensual contract between the parties.

There cannot be part performance of a contract not binding upon the parties by reason of mistake.

Where, in an action for specific performance, there had been an absolution of the defendant from the instance, on the ground of mutual misunderstanding, both parties ordered to bear their own costs.

December 9th, 1891.

Bale (with him Wylie) for plaintiff.

Escombe, for defendants.

The facts will be gathered from the written judgment, transmitted to the Registrar, in terms of Rules of Court of May 10th, 1870, secs. 4 and 5.

April 25th, 1892.

WRAGU, J.: The defendants are the executors testamentary of the estate of Richard Vause and the plaintiff is a merchant carrying on business at Durban.

In the declaration the plaintiff avers that on December 20th, 1890, he, by his agent, J. S. Wylie, purchased at a public auction certain two pieces of land, property of the said estate, on the auctioneer's conditions, which are annexed, and on a minute of purchase the words of which are quoted at length. He further avers that he was placed in possession of the said lands. He complains that, although the purchase price has been repeatedly tendered, the defendants have refused to transfer the lands in terms of the said conditions of sale and minute of purchase, and he seeks, by this action, specific performance or, alternatively, £250 damages.

The defendants plead that the said lots were purchased by plaintiff under the auctioneer's general conditions, annexed to the declaration, and also subject to a special condition, stated by the auctioneer at the time of the sale, as to certain water-pipes, and they aver that they offered to give transfer subject to such special condition or to treat the transaction as a nullity, which proposals the plaintiff has refused.

In the replication the plaintiff claims, if he be held liable to take transfer subject to the special condition, an abate-

ment in the purchase price to the extent of £100.

April 25.

The defendants pray, in reconvention, that the plaintiff Atkinson v. may be declared liable to take transfer subject to the said Vause's special condition, or, alternatively, that there may be a declaration that there was no consensus ad idem as to the terms of the intended sale of the said property.

The auctioneers, who conducted the sale, were Beningfield

& Son, auctioneers of 30 years' experience.

Richard Vause died in 1886, and his executors were W. J. Vause, R. W. Vause, and J. P. Hoffman. The two pieces of land, concerning which this action has been brought, formed part of his estate, and in 1888, when W. J. Vause was absent in England, water-pipes were laid extending from the Durban Corporation main in Vause Road, to which, on the northern side, sub-division 1 of the two pieces of land fronts, to the sub-division B1 which is on the southwestern side of the lower sub-division No. 2. These pipes are said to enter the top portion of the adjoining lot, subdivision L. of lot 11, then to run down the western side of the two sub-divisions in dispute, and to end in the subdivision B' whereon stands the house of Mrs. Vause, the wife of the executor, W. J. Vause. They supplied a hydrant which, at the time of the sale, was near a stable then standing on the upper of the sub-divisions in dispute, and they furnished the water supply to the house of Mrs. W. J. In order to correctly understand the above description, reference should be made to the large plan (marked No. 10) prepared for the purposes of the sale of these two sub-divisions, which was put in evidence at the trial and on which Mr. W. J. Vause roughly sketched, in pencil, the position of the said pipes.

On December 20th, 1890, Beningfield & Son put up for sale, at public auction, at their mart in Durban, 11 lots of land, of which Nos. 1, 2, and 3 were the property of the estate of Richard Vause: lot 2 consisted of the two subdivisions, with which we are concerned in this action. the instructions concerning these two sub-divisions were given to the auctioneers by W. J. Vause about a week before the sale, and on those instructions these lands were advertised and catalogued. On the day before the sale, that is on December 19th, W. J. Vause gave special instructions to the auctioneers concerning these two sub-divisions: those special instructions were not included in any printed advertisement or catalogue. Those special instructions were to the effect that the two sub-divisions should be sold with a reservation of rights as to the water-pipes running

1891. December 9. 1892. April 25.

Atkinson v. Vause's Executors. through sub-division L of lot 11 and through these two sub-divisions of lot 2 to his wife's house on the neighbouring land B¹.

On the day of the sale there were about 100 persons present in the sale room, which was described as being about \(\frac{1}{2} \) less in size than the Court room in which this case was heard. General conditions of sale, those which are annexed to the declaration, were read out by the auctioneer, S. F. Beningfield, and there was a large plan (No. 10) of these two sub-divisions of lot 2, affixed to a board which was lying flat on a table in the room. Catalogues were circulated through the room. The auctioneer was assisted by a clerk, E. S. Walbridge, who was "booking" and who said, at the trial, that he had prepared the minutes of purchase, for signature by the purchasers, two or three days before the sale, and, therefore, before the special instructions had been given by W. J. Vause. At the sale there were present the plaintiff, Mr. J. S. Wylie, Mr. W. J. Vause, and Mr. J. P. Hoffman.

Mr. Atkinson, the plaintiff, who is the owner of land in the near neighbourhood of these two sub-divisions, was in attendance with the express object of purchasing them. Mr. Wylie was there for the purpose of buying sub-divisions of lot No. 3. Messieurs W. J. Vause and J. P. Hoffman were present as executors of the estate to which lots 1, 2,

and 3 belonged.

Lot No. 1 of the catalogue was put up and was sold, admittedly, subject to the special condition mentioned by the auctioneer, but not contained in any advertisement, catalogue, or minute of purchase, as to the existing waterpipes running through it to the residence of W. J. Vause. That special reservation has been inserted in the formal deed of transfer, dated 19th June, 1891, to the purchaser, Mr. Dacomb: that reservation runs in the words, "this transfer is made subject to the right of leading water through the said property from the Durban Corporation Main in Vause Road to the sub-division B¹ of the said lot by the existing water-pipes and of entering upon the said property for the purpose of repairing or renewing such water-pipes."

The auctioneer, having so sold lot 1 of the catalogue, passed on to lot 2 containing the two sub-divisions in dispute. And, at this point, we have a direct conflict of evidence. On the one hand, we have the plaintiff and Mr. J. S. Wylie: on the other, there are the auctioneer, his managing clerk, Mr. W. J. Vause and Mr. Hoffman. It will be noticed that on neither side is there any evidence from independent and disinterested persons present at the sale.

It was matter of regret to myself that Mr. G. Russell, hereafter mentioned as one of the bidders, was not called as a witness.

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The account given by the plaintiff and Mr. Wylie is, sub-Atkinson v. stantially, as follows: Mr. Wylie was present with the Vanse's intention of purchasing sub-divisions of lot 3: at the com- Executors. mencement of the sale, he was sitting opposite to the plaintiff, but, while lot 1 of the catalogue was being sold, he moved his chair and sat down beside the plaintiff: he so moved, in order to ask the plaintiff his opinion concerning the sub-divisions of lot 3 which he, Wylie, intended to buy. When the sub-division 1 of lot 2 was put up by the auctioneer, the plaintiff asked Wylie to bid for it, on his behalf, being afraid that, if he himself should bid for it, the price might be run up against him. When bidding for that sub-division was going on or when the auctioneer was inviting bids for it, the plaintiff asked Wylie whether the water-pipe, mentioned with respect to lot 1, had also been mentioned with reference to lot 2. Without consulting the auctioneer or his clerk, Wylie replied, "No, it does not apply to this lot at all, but to an adjoining lot," and Wylie, at the trial, explained that he so replied because he knew the lie of the land and could not see what would be the object of having two pipes. They, the plaintiff and Wylie, admit that they heard a special condition mentioned by the auctioneer, as to lot 2, concerning a kaffir kitchen, a brick building, and a water-closet, then standing on lot 2, which had to be be removed by Mr. W. J. Vause, but they both stoutly maintain that the auctioneer did not say one word about any water-pipe reservation with reference to lot 2. Wylie made a bid of £195 for that sub-division 1 of lot 2, and it fell to him: sub-division 2 fell to Mr. George Russell's bid of £180. Then, the auctioneer put up the two sub-divisions together, for £375, and, under plaintiff's instructions, Wylie bid £380, for which price the whole lot 2 was knocked down to him. Wylie immediately signed, q.q. J. H. Atkinson, the minute of sale in the book which the clerk, Walbridge, had with him in the room. As I have already remarked, that minute had been prepared before W. J. Vause gave any special instructions to the auctioneers and it did not contain any reference thereto.

On the other hand, the auctioneer, his clerk, W. J. Vause and J. P. Hoffman positively affirm that the water-pipe reservation was specially mentioned, with reference to lot 2, by the auctioneer, before any bids were made for it. They describe, precisely, the circumstances in which such mention was made. They say that the auctioneer put up subdivision 1 of lot 2 without any reference to the water-pipes, December %.
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and Mr. W. J. Vause, observing the omission, said to the clerk, "go and tell Frank that he has forgotten to mention the pipe." Thereupon, the clerk pulled the auctioneer's coat and told him what Mr. Vause said. At once the auctioneer mentioned the servitude as to the water-pipes, at the same time indicating roughly, with his hammer, the route of the pipes on the large plan (No. 10), which was affixed to the board and which he took up and put on end in view of the persons in the room. They testify, most positively and with the greatest emphasis, that the water-pipe reservation was duly proclaimed by the auctioneer before any bids were made for lot 2 of the catalogue.

Such is the conflict of evidence as to the sale itself. After the sale, the plaintiff, being anxious to clear the ground during the Christmas holidays, spoke to Mr. Vause and then set some kaffirs to work thereon: at the same time, at the request of Mr. Vause, he permitted Mr. Fraser, who resided on the neighbouring lot, to use, for a short time, the buildings on lot 2 which Mr. Vause had to remove. About a month or six weeks elapsed and then, when preparations were being made for the formal transfer, it was discovered that the parties were not at one, the defendants being under the firm belief and understanding that the plaintiff had purchased the lot 2 subject to the water-pipe reservation, and the plaintiff being as strongly confident that the sale had been free from any such reservation or condition.

When it was sought, on behalf of the defendants, to let in parol evidence with reference to the special condition as to the water-pipes, the learned counsel for the plaintiff objected to its admission on the ground that its object was to vary the written contract whereon the plaintiff relied, and he also relied upon our Law No. 12 of 1884. To this objection the learned counsel for the defendants replied that it had been the practice of our Court to admit such evidence in auctioneers' cases, quoting Fell v. Mullins, N.L.R. 4, p. 93. and Stevens v. Beningfield & Son, N.L.R. 5, p. 282, and he further contended that Law No. 12 of 1884 did not apply to this transaction, as far as defendants were concerned, because they were not bound in terms of the 1st section of that law. With reference to the point for decision, that is, whether parol evidence could be admitted to shew that the general conditions and the minute of purchase did not contain the whole contract between the parties, I think that there is force in this last contention of the learned counsel for the defendants, because the minute in the sale book was not signed by or on behalf of the defendants or by or on behalf of any person for whose contracts the defendants were then liable, in terms of the said 1st section.

December 9. As to Fell v. Mullins and Stevens v. Beningfield & Son, they were both decided before Law No. 12 of 1884, the latter only a few months before that law came into force. Atkinson v. In Fell v. Mullins the late learned Chief Justice, Sir Henry Yause's Connor, not only recognised the right of a bona fide seller Executors. to guard himself from liability by auctioneers' statements at the sale, but he spoke in commendation of such verbal announcements. His words are: "I conclude, from the evidence, that the auctioneer did publish at the commencement of the sale, and repeatedly, that from the wandering nature of the owner's trading and his having to return almost immediately to Zululand, he would not be responsible for disease in the cattle. . . . I think that the viva voce announcements would be more likely to impress a hearer than those that were read. There is then, I apprehend, no doubt but that by our law a bonâ fide seller may guard himself from liability by such a proviso (Poth. Vente, vol. 3, s. 210; Dig. 21.1.14 (9) and 19.1.1 (1) and 18.4.13 and 14.231; Vin. De Pact. 18.1). The plaintiff, not having been present at the beginning of the sale, may not have known of this precaution: but that, I apprehend, cannot exempt him from being bound."

But the real answer to objections concerning the admission of this parol evidence is that the present action is one for specific performance and that it was held so long ago as 1802 (Woollam v. Hearn, 7 Ves. 211 and Tudor's Leading Cases, 2, pp. 508-541) that a defendant, resisting such claim, where there is surprise or mistake, may lead parol evidence to shew that a written instrument does not contain the whole of the contract between the parties. In Clowes v. Higginson, 1 Ves. and B, 524, decided in 1813, the Vice-Chancellor (Sir Thomas Plumer) said: "The exclusion of parol evidence, offered to explain, add to, or in some way to vary, a written contract relative to land, stands upon two distinct grounds, not simply as being in direct opposition to the Statute of Frauds, but also upon the general rule of evidence independent of that statute. The writing must speak for itself and can receive no aid from extrinsic evidence of this more loose and dissatisfactory nature. That, which is the rule of Law, prevails equally in Courts of Equity, which admit no different rule of evidence upon this subject; and thus far the rule is perfectly clear, rejecting parol evidence offered by the plaintiff to constitute, vary, or explain, a contract in writing concerning land, of which he seeks the specific performance in a Court of Equity. The difficulty is, how far evidence is admissible. offered as a defence against a Bill praying a specific per-

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Atkinson v. Vause's Executors. formance. Upon that there undoubtedly are many cases, where the evidence has been received, and, without enumering the authorities, it may clearly be admitted for that purpose upon a plain and obvious principle, that a Court of Equity is not bound to interpose by specifically performing the contract, and, though the subject and import of the written contract are clear, so that there is no necessity to resort to evidence for its construction, yet, if the defendant can shew any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a Court of Equity, having satisfactory information upon that subject, will not interpose.

"The rule, admitting evidence in those cases, is intelligible and clear. It is admitted not to vary an agreement, as it is expressed open to no objection, and therefore upon the letter binding, but to shew circumstances of fraud, making it unconscientious in the party, who so obtained it, to insist upon, and unjust in the Court to decree, the performance.

"Fraud is not the only head upon which parol evidence may be received, and, if made out satisfactorily, a specific performance may be refused. Upon clear evidence of mistake or surprise, that the parties did not understand each other, it is introduced, not to explain or alter the agreement, but consistently with its terms to shew circumstances of mistake or surprise, making a specific performance, as in the case of fraud, unjust, and therefore not conformable to the principles upon which a Court of Equity exercises this jurisdiction."

That most lucid exposition of the grounds upon which parol evidence may be admitted, for a defendant, in cases of specific performance, exactly applies to the case with which I am now dealing. Really, the defence is that the parties did not understand each other, that the defendants sold one thing and the plaintiff bought another, and that, in the circumstances of mistake or surprise revealed by the whole evidence, written and parol, it is unconscientious in the plaintiff to insist upon, and unjust in the Court to decree, the specific performance for which plaintiff prays.

I am of opinion, therefore, that the parol evidence, to which the learned counsel for the plaintiff objected, was

rightly admitted.

Upon the whole evidence, I find that the special condition as to the water-pipe reservation in the lot 2 of the catalogue was proclaimed by the auctioneer before the plaintiff or any other person made a bid for the 1st sub-division of that lot. I further find that neither the plaintiff nor his agent, Wylie, heard such proclamation by the auctioneer: I cannot but think that they failed to hear it because they

were, at the moment, engaged in conversation inter se concerning the sub-divisions of lot 3 and concerning the advisability of Wylie making bids for lot 2 on behalf of

plaintiff.

Upon such findings, what should be my judgment? is not necessary to discuss the liability of plaintiff for a special condition which, although proclaimed, he did not hear, a liability to which the late learned Chief Justice, Sir Henry Connor, made significant allusion in his judgment in Fell v. Mullins, it is not necessary, I say, because the learned counsel for the defendants, in his address, plainly said that they had no wish to bind the plaintiff to specific performance of the contract under the special condition if he, in fact, did not hear such condition proclaimed by the auctioneer. The defendants resist the specific performance which the plaintiff claims, and rightly so. There was never a consensus ad idem between them as to this land. The defendants intended to sell a thing which the plaintiff did not intend to buy. There was a mistake and, really, there was no contract of sale between the parties. It is, therefore, clear that the Court must stay its hand and must refuse the specific performance which plaintiff seeks. By so doing, I remit the parties to the position which they occupied before lot 2 was put up for sale.

In the view which I have taken, it becomes unnecessary to consider the question of part performance. There cannot be part performance of a contract which never existed. Whatever was done as to this land, after December 20th, 1890, was done by both parties under the mistake and, in

the circumstances, bound neither of them.

It is equally unnecessary to discuss the question as to the way in which the water-pipe reservation or servitude was created, even if it were possible, which I much doubt, for the plaintiff to raise such objection against the executors, who are the sellers, from whom alone he can claim title.

The claim for damages falls with that for specific per-

formance.

The defendant in convention is absolved from the instance, and judgment is entered for the plaintiff in reconvention on the ground (b) that there was no consensus ad idem between the parties as to the terms of the intended sale.

There has been a mutual misunderstanding, and parties must bear their own costs (Calverley v. Williams, 1 Ves., 209; Stratford v. Bosworth, 2 Ves. and B., 341; Clowes

v. Higginson, 1 Ves. and B., 524).

Sir Henry Connor's remarks, concerning the verbal announcements of an auctioneer, were made in a case where the plaintiff sought to set aside the sale of cattle and to

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obtain a return of the price. I desire to close this judgment with the expression of my own strong opinion that in sales of land, if not in other important sales, it is not desirable that an auctioneer should keep a reservation, of serious moment and one which will probably cause a purchaser to bid less for the land, for mention, for the first time, in a crowded room and at the very moment when the hammer is going up for its sale. A purchaser ought to have time for reflection, which becomes impossible unless such reservations be inserted in the printed advertisements and catalogues issued before the day of sale. I further think that a minute of purchase ought to contain a reference to such reservation.

[Plaintiff's Attorneys: H. Bale & Wylle. Defendants' Attorney: HARRY ESCONBE.]

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Bank of Africa, Limited, v. The Salisbury Gold Mining Company, Limited, from the Supreme Court of the Colony of Natal; delivered 13th February, 1892.

Present:—Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Hannen, Sie Richard Cough.

[Delivered by Lord Watson.]

The object of this action is to compel the respondent Company to register a transfer by one Tristram Woolridge to the appellant Bank of 400 of its paid up shares. The Company declines to do so until a debt due by Woolridge, the registered owner of the shares, has been satisfied.

By section 38 of its Articles of Association, the Company has a first and paramount lien upon all the shares registered in the name of each member for his debts to the Company; and section 52 provides that no shareholder shall be entitled to transfer his shares, without the approval of the Directors, "so long as his shares are not fully paid up, or afterwards, if he either alone or jointly with any person or persons is indebted to the Company on any account whatever." The

validity of a lien conferred in these or similar terms by Articles of Association was fully recognised by the House of Lords in *Bradford Banking Company* v. *Briggs & Co.* (12)

Ap. Ca., 29).

The appellants do not dispute that, in the absence of any waiver of its lien, the Company would be justified in refusing to register their transfer. But they maintain that certain transactions which took place between Woolridge and the Company, as well as between the Company and themselves, necessarily imply a surrender of the Company's right to treat the 400 shares in question as a security for the debt

due by Woolridge.

It appears that the Company, in December 1888, resolved to increase its capital by the creation of 3,000 new shares of £1 each, of which 750 were kept in reserve, and the remainder offered to the public. George Brown, a broker in Pietermaritzburg, acting under a power of attorney from Woolridge, tendered for the whole 2,250 shares, £1 subscription with a premium of £35 16s. for each of them, payable one-fourth immediately, another fourth upon allotment, and the balance upon the 28th February, 1889. The tender was accepted, and Woolridge duly paid the first two instalments amounting to £41,400. Before the balance became due, he paid the amount stipulated for 1,250 shares, and obtained certificates for them as fully paid up.

When the 28th February arrived, Woolridge did not find it convenient to pay the balance then due in respect of the remaining 1,000 shares, which amounted to £18,400. On that day, the Company, at his request, agreed to take his promissory note for the balance, payable on the 15th May, 1889, in consideration of his consenting that, in the event of the note being dishonoured at maturity, the Company should have full power to dispose of the 1,000 shares, which were either to be retained in the meantime or transferred to

a trustee for the Company.

Under a written agreement between him and the appellant Bank, made in March 1888, Woolridge was allowed to draw against a mass of securities deposited with the Bank, which he was permitted to reclaim from time to time, on substituting other securities for those withdrawn; his obligation being to keep the amount of the Bank's advances to him fully covered. In March 1889, he deposited with the Bank, in pursuance of that obligation, certificates representing the 400 shares now in dispute.

Before his promissory note matured, Woolridge applied to the Company for a further extension of the term of payment. To that request the Company acceded, upon terms which were embodied in an agreement dated the 6th and

10th May, 1889. In accordance with these, Woolridge gave a new promissory note for the amount of his debt, to be renewed from time to time if both parties consented. He also agreed to transfer the 1,000 unpaid shares to the Company's solicitor, in trust for the purposes of the agreement, and in security of the debt; and he authorised the trustee, in case of his default, to realize the shares at once, and to pay the proceeds to the Company, "in satisfaction or on account of the said liability."

It was argued by the Appellants that the Company, in February, and again in May, 1889, transacted with Woolridge upon the footing that his debt, as then constituted by a promissory note, was to be specially charged upon the 1,000 shares, and must therefore be held to have passed from any lien previously affecting the 1,250 shares for

which certificates had been issued.

Their Lordships do not doubt that a right of lien may be discharged by a new arrangement between creditor and debtor, the terms of which are incompatible with its retention, or by any other arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced. An agreement giving the creditor new and special powers with respect to part of the subjects covered by his original lien may be conceived in such terms as to imply that he is not to have recourse against the remaining subjects. But the mere fact of the debtor agreeing to give his creditor authority to sell part of the subjects without notice, upon his making default, is not, in the opinion of their Lordships, sufficient to warrant the inference that the creditor is not to realize the other subjects of his security, if necessary. It indicates the intention of the parties that the burden of the debt shall be cast, in priority, upon the subjects to which the authority relates; but it does not necessarily imply that the security of the creditor is to be restricted to these subjects.

Their Lordships are unable to find in the agreements of February and May, 1889, any stipulation or expression calculated to suggest that a limitation of the lien given to the Company by its Articles of Association was in the contemplation of either party. On both occasions Woolridge asked for time and nothing else, and the indulgence was granted in consideration of his authorizing the 1,000 shares to be sold if and when default was made, without the necessity of waiting for 14 days after written notice to him, as prescribed

by Section 39 of the Articles of Association.

Upon the 22nd June, 1889, the Appellants, by a letter addressed to the Secretary of the Company intimated that they had a lien over 400 shares registered in the name of

Woolridge, and requested that any dividend arising upon these shares should be paid to them. Until receipt of that communication the Company had no notice of the Bank's title to these shares, and had no reason to suppose that any one was asserting an interest preferable to its own lien. On the same day the Secretary sent a reply, declining to recognise any other person than the registered owner as having right to dividends, and suggesting that the appellants should obtain an order from Woolridge for payment of dividends to them. No reference was made in that letter to the Company's lien; but, on the 11th July, 1889, the Secretary. having meanwhile brought the matter before his Directors, wrote by their instructions to the appellants, stating "that, acting under and by virtue of the provisions of Clauses 38 and 52 of our Articles of Association, they cannot in any way recognize the lien held by your Bank over shares in Mr. Woolridge's name." At the time when this correspondence passed, Woolridge had not executed a transfer of the shares to the Appellants, and, in point of fact, he did not do so until the 80th August, 1889.

If the Appellants, during the interval of time, between their receipt of the Secretary's letters of the 22nd June and the 11th July, had made fresh advances to Woolridge, in the belief that the Company did not mean to claim any right to the shares, the question would have arisen whether the Company could assert its lien, so as to defeat the security of the Appellants for these advances. But the relative position of the Appellants and their debtor Woolridge remained unaltered during that period. It was also suggested that the Company had lost its lien by giving effect to transfers by Woolridge of other parcels of his 1,250 paidup shares, and thereby charging an undue proportion of Woolridge's debt upon the shares deposited by him with the Appellants. It is sufficient answer to say that the suggestion is without foundation in fact, because the evidence shows that after the 22nd June, 1889, although various transfers by Woolridge were presented for registration, the transference was in every case suspended, possibly in order to await the result of this controversy.

In these circumstances their Lordships are of opinion that the judgment of the Court below is right, and they will therefore humbly advise Her Majesty to dismiss the appeal. The Appellants mast pay the costs incurred here by the Respondents.

NATAL LAW REPORTS

(NEW SERIES) VOL. XIII., PART III.

MAY, 1892.

THE EXECUTRIX OF THE ESTATE OF THOMAS JEE (Appellant) v. JOSEPH STANLEY (Respondent).

Jee's Executors v. Stanley v. Stan

Review. Magistrate's Court. Judgment contrary to weight of evidence.

Magistrate's judgment set aside on review, it appearing to the Court that such judgment was contrary to the weight of evidence.

(In banco.)

This was a review of the decision of the Magistrate of the Umgeni Division, pronounced on the 4th April, 1892.

The claim was for £30, being the price of an iron house sold by Thomas Jee deceased to the respondent. It was alleged that the purchaser had given an I.O.U. for the price, but the document had been lost. The plaintiff, however, tendered indemnification.

The Magistrate found that there was no proof of a contract of sale; and, regarding the evidence for the defence, in the absence of any document to be "as good as that for the plaintiff," he found for the defendant.

The plaintiff appealed.

Tatham, for appellant.

Coldridge, for respondent.

1892. May 2. Jee's Executors v. Stanley GALLWEY, C.J., after citing an extract from the judgment in "The Glannibanta," (1 Prob. Div. 283—vide Rademan v. Margary and Richards, 13 N L.R., at page 28) referred to the facts, and was of opinion that the Magistrate, in weighing the evidence, had shown an error in judgment.

WRAGG, J.: The Magistrate was woefully wrong in his judgment. [His Lordship referred to the facts.] To my mind, the evidence is very conclusive against the defendant, and I must say that the Magistrate's decision has rather astonished me. Were that judgment to stand, there would be a miscarriage of justice. The indemnity offered by the plaintiff should be given before execution.

TURNBULL, J.: The evidence is very unsatisfactory, but it preponderates on the side of the plaintiff. The Magistrate's judgment should, in my opinion, be set aside.

Per curiam: The Magistrate's judgment corrected to a judgment for the plaintiff (appellant). The indemnity tendered to be given before execution.

[Appellant's Attorneys: LAUGHTON & TATHAM. Respondent's Attorneys: BOSHOFF & COLDRIDGE.]

Jan. 8 and 9. May 8. Colonial Govt.

v. Nathan

Bros.

THE COLONIAL GOVERNMENT (Appellant) v. NATHAN Bros (Respondents).

Carrier. Common law liability. Goods lost while in charge of Railway Department. Alleged defective packing.

Measure of damages.

- 1. A carrier by land is subject to the civil law edict declaring the liability of shipowners and others.
- 2. In an action for the value of goods lost from a package entrusted to the Government Railway Department for conveyance by rail and delivery to the consignees, the damaged state of such package, the fact that it had been

repaired, and the mode of packing, being known to the Jan. 8 and 9. Railway officials, who accepted the case as being strong May 3. enough for the journey which it had to undergo, it ap-Colonial Govt. Nathan pearing also that further injury to the case, resulting in Bros. the loss of part of its contents, occurred while it was in the custody of the Railway Department, HELD: That a plea of contributory negligence by defective packing was no defence to the action.

3. Where goods had been entrusted to a carrier by land for conveyance, and had been lost, and not replaced, HELD: That the measure of damage was the market value of the goods lost, such value being the prime invoice cost, with Customs dues, importation expenses, and importer's profits added. Ten per cent. over all expenses held to be a reasonable importer's profit.

January 8 and 9, 1892. (In banco.)

This was a review of the judgment of the Magistrate of the City Division, Pietermaritzburg, pronounced on the 23rd November, 1891, in favour of the plaintiffs (now respondents). The claim was for £12 10s. 0d., being the value of certain goods lost in transit, while in charge of the Natal Government Railway Department. The defendants tendered £7. The Magistrate gave judgment for £9 4s. 6d., being 100 per cent. on the invoice value of the parcel, reduced to 50 per cent. on account of contributory negligence in packing.

The facts of the case will appear in the judgment afterwards delivered.

Morcom, A.G., for appellant:—The tender was sufficient. A loss of market is not to be considered in estimating damages ("The Parana," 2 Prob. Div., 118). The true measure of damages is not the retail value, but the invoice price of the goods in London, plus the cost of bringing them here. ("The Notting Hill," 9 Prob. Div., 105; Horne v. Midland Railway Company, 7 C.P., 583 and 8 C.P., 131; Gee v. Lanc. and Yorks. Rg. Coy., 30 L.J. Exchq. 11; Rice and another v. Baxendale, ibid 371). If there be no wilful breach, only actual damages are allowed (Walkden v. N.G. Railways, 2 N.L.R., 222: "The Argentino," 13, Prob. Div.

Gan 8 and 8.

Hay 3.

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61, and 14 App. Cases, 519; Leathern v. Bray and ethers, 6 N.L.R., 20.) The value of the goods is to be reckoned backwards, not forwards (Lex Aquilia—Inst. 4.8.10, 13, and 14. and 9.2. 21 and 22; Jones v. Stewart, 3 Roscoe's Reps., 17). The case was not sufficiently strong for the class of goods, and on that account no profits should have been allowed, there being contributory negligence. (Baldwin & Co. v. London C. & D. Ry. Co., 9 Q.B.D. 582; Higginbotham v. G. N. R. Ry. Co., 2 F. and F., 796.)

Laughton, for respondents:—The authorities on the question of late delivery are not applicable. Where there has been non-delivery, the measure of damages is the price of the goods at the place to which they have been consigned. A merchant is entitled to damages including his profit. (O'Hanlan v. G. W. Ry. Coy., 11 Jur. N.S., 797) "Usual importer's profit" is allowable. (France v. Gordett and others, & Q.B. 199.; Raw & Co. v. H. Perker & Co., 11 N.L.R., 160; Macnamara on Carriers (Ed. 1888) pp. 81 and 193; Mayne on Damages (Ed. 1884) pp. 9, 17, and 30, and cases therein cited; Domat, Civ. Law, 294; Beit v. Trubshawe, 8 N.L.R., 117.

Morcom, A.G., in reply, cited The British Columbia Sawmill Co. v. Nettleship (8 C.P., 499); Naylor v. Munnik (3 Searle's Rep., 187).

(Cur. ad. vult.)

Postea. May 3, 1892. (In banco.)

The following judgment was delivered by:-

GALLWEY, C.J.: This was a review before the Supreme Court, from a decision of the Resident Magistrate, City, in the case of a claim by the appellant against the Colonial Secretary in the sum of £12 10s. for and as the value of certain soft goods entrusted by the appellant to the Natal Government Railways on the 15th September, 1891, to be safely carried from the Point to Pietermaritzburg, the contents of a case No. 2,951, which said goods were lost from said case which was damaged and bulk broken in transit.

Negligence was not averred in the summons.

There were two special pleas, the one that the sum of £7 with costs was duly tendered to plaintiffs' Attorneys on Menday, 11th November.

That tender was as follows:—"I new beg to tender you herewith, cheque for the sum of £7 in full settlement of

this claim \$6 5s. in respect of the invoice value of the goods Jan. 9 and 9. lost from the case, and 15s. to cover any incidental expenses May 3. Messrs. Nathan may have had in connection with the case.

2. Special plea. There was contributory negligence on r. Nathan

part of the plaintiff, in that the goods swed for were packed Bros. in a case which was not sufficiently strong to stand the ordinary handling necessary in connection with the carriage

of goods by rail and otherwise.

No carriers note under the Carriers Law No. 11, 1884, or under Law 9, 1882, was submitted in the evidence, no exception was relied on, and the case was conducted on the principle of a carrier for hire, who did not limit his liability by any written conditions or exceptions.

This particular case was packed in Manchester, conveyed by the usual mode of transport, including carriage by steamer to Durban, and was delivered to the Natal Government Railways by Savory & Co. at Port Natal on the 15th

September, 1891.

The receipt given by the Natal Government Railways for this package is in terms as follows No. 118, Port Natal,

15/9/91.

N.G.—Please receive in good order and condition from W. H. Savory & Coy. ex Durban, on account of Nathan Bros., 2951. The receipt is signed by Fred. Hardouin on behalf of the Natal Government Railways; on margin is

inscribed "repaired."

The case 2951 was sent by wagon No. 1089 from Point to Pietermaritzburg on September 16, 1891, the word "repaired" entered on margin as being remark of the loader, the goods loading way bill being signed by Fred Hardouin for the Natal Government Railways. The case was broken when it came on shore. Smith states, "I handed case over to Tremearn, called his attention to the case that he might satisfy himself, that although the case was broken the contents were there."

Upton repaired the case, and asserts it should have arrived safely in Pietermaritzburg with proper care. oil paper in which the goods were wrapped was not torn.

Tremearn asserts the case was absolutely full.

Hardouin, the Railway checker, states: "the case did not appear to be very strong, but strong enough to go to Pietermaritzburg. If the case had not been sufficiently strong I should not have loaded up. It must have been roughly handled. It must have had something like a fall." "I would not certify the case to be strong unless I examined it."

Dick says, "The case was not broken in half when I oft-loaded at Pietermaritzburg."

Jan. 8 and 9. May 3. Colonial Govt. v. Nathan Bros.

Wright says, "The case was not broken in half when I handed it to Beningfield's driver. The plank was sprung but not sufficiently sprung for anything to fall out. It was covered with waterproof paper which was quite sound."

It is not necessary to go into the question, that when a Railway Company accepts goods the company is bound to deliver safely the goods received for conveyance, and that the "onus" lies on the company to show that the loss took place under circumstances which exempted them from liability under the general law.

A special edict was passed by the Prætor, "Ait Prætor; Nautæ, caupones, stabularii, quod cujusque salvum fore

receperint, nisi restituent in eos judicium dabo."

The edict did not extend in terms to carriers on land, but in most, if not in all, modern countries, the rule has been practically expounded to include them (Story on Bailments, sec. 459).

It may be traced in the jurisprudence of Holland (Domat

1179 to 1183.

Domat (529) in express terms includes carriers as being

under the same liability as ship owners.

The courts of Scotland have extended and applied the edict to carriers, owners, stage coaches and railways (Bell's Com., 3, 1, 26, p. 675).

The case appeared to the officers of the Natal Government Railways to have been sufficiently strong for the purpose it was required, and to use the words in the judgment in *Brunskill's* case, (5 N.L.R., 31): "If a carrier were to accept a badly packed parcel he ought to use more care

on that ground."

The English Law is: a carrier is not responsible for damage accruing to the goods caused from improper packing by the sender when there has been nothing to indicate to the carrier the defective nature of the packing. But the carrier can not absolve himself from liability when he has the means of observing the risk he runs in accepting goods in the state in which they are presented to him, and with such knowledge the giving a receipt in good order and condition is binding upon him.

In Oxford v. Donald Currie Co. (2 N.L.R., 230) an action for forage short delivered ex Florence. The principal defence raised was defective packing of the bales in which the forage was packed. The Resident Magistrate in the Court below (Durban) threw all responsibility for the bad packing at Capetown upon the plaintiff. The Supreme Court held that it appeared to them that none of the responsibility ought to be thrown on the plaintiff on the grounds that the bill acknowledged the goods to be shipped

in good order and condition, and that therefore that statement must be held to be true as between him and the defendant.

May 3.

In Higgenbotham's case (2 F and F, 796) on appeal the Colonial Govt. Court of Exchequer submitted that want of care in package Bros. went merely to the damage and not to the cause of action, and I consider the Resident Magistrate was correct in his view of the law in this case. The Company had knowledge that the case was injured, and had been repaired; they had knowledge the goods were not in a tin case but wrapped in paper, and that the paper was not open. They accepted the goods, entered into a contract to carry the goods, and admitted that the goods were sufficiently cased and packed for the requirements of the journey. I concur in a question left to the jury in Cox v. London and North Western Railway Co. (3 F and F) where oil was asserted to have leaked from defects in the cask, namely—" If the defendants had notice of the defects in the case when delivered, were they guilty of negligence in forwarding them in that state." The jury having found for the plaintiff, that the leakage was not caused by defects in the cask, expressed their opinion that the goods should not have been forwarded from the London Station in the condition they were found to be.

The injury to the case was caused between the Point and the delivery of the goods in Church Street; the evidence goes to show between the P.M.Burg Station and Church Street. The Company was "dominus itineris" and on that account and in terms of the Law 9, 1882, sec. 23, was liable for the loss of the goods between the Point and until placed

at the doors of the consignee in Church Street.

The Resident Magistrate gave the damages against the Company in the sum of £9 4s. 6d. arrived at by allowing the plaintiff 50 per cent. on the invoice price of the goods. He states he deducted from that sum the value of an article, admitted at the Bar to be "Galatea," which was invoiced at 13s. 4d. There is some error in his calculation, the invoice price of the goods after deducting the "Galatea" was £5 11s. 8d. with 50 per cent. added. The amount awarded should be £8 7s. 6d.

When goods are entrusted to a Railway Company for conveyance and are lost the owner is entitled to recover their value.

How is that value to be ascertained? If the Company can replace the goods by goods of similar kind they may do so; an offer in that behalf was made to the Company and not accepted. It is urged in O'Hanlan's case (34 L.J. Q.B., 154) that the owner of the goods is entitled to purchase similar goods at the place where the carrier undertook 1993. Jan. 8 and 9 May 8.

to deliver them, and the market price may be resorted to as affording the true test of the measure of damages.

Otlonial Govt, v. Nathan Bros.

Justice Shee, in giving judgment, states—"The value of the goods at the place and time appointed for delivery is the market price, and if there is no market price, the value at the time and place must be ascertained by the circumstances; in the case of goods intended for commerce, the value at the place of destination, the prime cost of the goods, the expenses of packing, freight, and other shipping charges, customs dues, and a reasonable sum for importer's profits.

It is clear that where there is no actual market, importers regulate the market prices not simply by the individual cost and charges of each, but by the general cost, average cost, charges, and general average importer's profits.

In O'Hanlan's case Mr. J. Meller lays down the following rule—"It is impossible to lay down that where there is no market, the damages are to be limited to the cost price of the goods and the expenses of carriage. Justice clearly demands that another item, 'Importer's profit,' should be included."

The question of reasonable damages for non-delivery of goods by steamer was determined by this Court in the case of Hess v. Union S. S. Co. (N.LR. 1875, p. 15). Guns shipped in England by a Natal merchant for delivery at Delagoa Bay were detained at Port Elizabeth for some contravention of customs dues by the Union S. S. Co. An action was brought for damages for non-delivery of the guns, and a claim made for £4,401 10s., thus made up: Cost price £1,301, nett profit £2,989 14s. 3d., freight £108. The case was heard before a jury, judgment was recorded for the plaintiff in the sum of £2,049 11s., ascertained as follows: £1,301 8s. 7d. cost price, £44 2s. freight, £672 15s. 3d. nett profit 50 per cent., £31 15s. 2d. interest.

Mr. Justice Phillips directed the jury that the fairest way of arriving at the amount of damage where a fixed market value cannot be ascertained, as in cases of this description, was a consideration of the amount of monies the plaintiff is out of pocket, the time he is out of his monies, and fair merchants' profit.

Exception to the Judge's direction was taken; it was urged that the Judge should have directed the jury that the cost price of goods at place of discharge and interest was proper measure of damages. Application for a new trial was refused.

An appeal was lodged to Privy Council but was not prosecuted.

The case had been tried at a former circuit in Durban, Jan when the jury gave a verdict for £4,500, the full value of the goods for non-delivery within reasonable time. The verdict was set aside and a new trial ordered, as the thinks ordered as the Brog.

verdict was based upon a total loss of goods.

The Supreme Court has therefore not alone approved of, but it seems to me extended the principle as regards damages in O'Hanlan's case (vide supra).

The prime cost of these lost goods in this case can be

ascertained from the invoice.

The customs dues are easily arrived at (Ordinance 1856,

40c. 10).

The actual expenses of importation were not detailed in Court; the expense can only be estimated on general average. A competent witness states the cost of importation at from 20 to 221 per cent. The estimate is not so precise as one would desire, but we must take it faute de mieux.

Importers' profits are not detailed; from one's own experience I consider that 10 per cent. on all expenditure is fair importers' profit. I therefore find, for the reasons given by me, that the sum of £7 16s. 6d. is the market value of these lost goods in P.M.Burg.

I therefore reduce the Resident Magistrate's decision to

I arrive thus at this amount:---Invoice price of goods... ... 22½ on £5 11s. 8d., cost of importation Importers' profits £7 16

There will be judgment entered for the plaintiff in the sum of £7 16s. 6d. and costs of the Court below, and of this appeal.

WRAGG, J.: I have come to the same conclusion.

TURNBULL, J.: I have had the advantage of perusing the indement of His Lordship the Chief Justice, in which I entirely concur.

' Per curiam: The Magistrate's judgment turned into a judgment for the plaintiffs (now respondents) for £7 16s. 6d., with costs including those of review.

[Appellants' Attorney : R. F. Morcon. Respondents' Attorneys: Laughton & Tatham. January 3. THE PROTECTOR OF IMMIGRANTS (Appellant) v. RAMASAMY May 3. (Respondent).

Protector of Immigrants v. Ramasamy.

- Indian Immigrant. "Absence without leave" of indentured immigrant. Sections 30 and 31 of the "Indian Immigration Law, 1891." Powers of Protector, Assistant Protector, and Mugistrates.
- 1. An indentured Indian immigrant having come to the Protector of Immigrant's Office in Durban to make a complaint against his employer, the Assistant Protector found the complaint to be vexatious and ordered the immigrant to return to his master. The immigrant, however, remained in Durban, absenting himself from his employer's service which was in another magisterial division.
- HELD: That, in these circumstances, the immigrant was rightly brought before the Magistrate of Durban, as "the nearest Magistrate," under secs. 30 and 31 of the "Indian Immigration Law, 1891," to be dealt with, as absent without leave, and not being free from arrest under the first proviso of sec. 30 of that law.
- 2. Neither the Protector of Immigrants nor a Magistrate has power, under the "Indian Immigration Law, 1891," to order an indentured Indian immigrant, who has made a complaint before him, to return to his employer's service, or to punish him for not returning.
- 3. The Assistant Protector of Immigrants is not empowered by the "Indian Immigration Law, 1891," to perform any of the duties imposed by secs. 30 and 31 of that law on the Protector of Immigrants.

January 8, 1892. (In banco).

This was a review of the judgment of the Magistrate of Durban, pronounced on the 12th November, 1891.

The respondent, an indentured Indian immigrant, was brought before the Magistrate charged with contravening secs. 30 and 31 of Law 25, 1891 (1) by being absent from Protector of his employment without a pass; (2) by refusing or neglect-Immigrants v. ing to return to his master's estate when ordered to do so Ramasamy. by the Protector of Immigrants. The Magistrate discharged the accused, it appearing to him that his Court had no power to impose any punishment.

The Protector of Immigrants appealed.

The facts of the case will appear in the judgments afterwards delivered.

Morcom, A.G., for appellant: The respondent was not exempted from arrest under sec. 30 of the Law, as he was not "on his way" to the Protector of Immigrants, but had already been there, and his complaint had been found frivolous and vexatious. The Magistrate was fully empowered to deal with the case.

Pitcher, for respondent: It was not the Protector but the Assistant Protector who received the respondent's complaint, but the Law gives no power to the latter officer to hear The 31st section does not meet the case, the complaints. Indian's absence not having been unlawful from the be-The respondent was protected by section 30; he was not unlawfully absent, as he had not even seen the Protector.

(Our. adv. vult.)

Postea: May 3, 1892. (In banco).

The following judgments were delivered:—

GALLWEY, C.J.: The proceedings in this case seem to

have been very irregular.

The Indian, dissatisfied with his master, proceeds from Camperdown to Durban to lodge a complaint with the Protector of Immigrants. The Assistant Protector, under what authority I know not-and no section of the Law has been relied upon as conferring any authority to entertain complaints made to the Protector—under the 30th section investigates these complaints, finds them groundless, and orders the man to return to his master.

The Indian remains in Durban. The Indian is prosecuted before the Resident Magistrate, Durban, for contravention of secs. 30 and 31, Law 25, 1891, being absent without a pass and with refusing or neglecting to return

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to his master's estate when ordered to do so by the Protector of Immigrants.

The Indian was discharged. The question is now sub-

mitted for review of that decision.

The Indian pleaded guilty of being absent without a pass, and refusing to obey an order of the Protector. The Law declares it a criminal offence to be absent without a pass.

The Law does not declare the refusal to obey the Pro-

tector's order to be a crime.

The Law bristles with offences declared to be crimes. To offend the Protector's dignity is not a crime. The charge against the Indian is two-fold, the one, being absent without a pass, which is a crime; the other, disobedience to obey. the Protector's order and return, which is not a crime.

There is no power conferred by the Law on the Protector of Immigrants to order the complainant Indian to return to his master, or to punish him for not returning, neither is there power given to a Magistrate to order an immigrant to return to his master. The immigrant may be fined or imprisoned; when the fine is paid or imprisonment terminated the Resident Magistrate may forward the immigrant to his master, or if unable to find the master, may forward the immigrant to the Protector or Deputy Protector. These sections are not clear or distinct. It is not contemplated that an Indian coming to Durban from Camperdown to make a complaint to the Protector in Durban, and remaining in Durban after he has made his complaint, is not absent without leave and punishable under the 31st section. immunity given by the 30th section is—freedom from arrest when the immigrant shall be on his way to lodge a complaint before the Protector.

The Law 25, 1891, sec. 31, provides for punishment for a man being absent without leave, and the proviso does not protect the immigrant when continuing his absence after

he has made his complaint.

It is impossible to ascertain what legal or judicial power

the Assistant Protector of Immigrants can exercise.

The Law empowers the Assistant Protector, in the absence of the Protector, to board ships, but gives no one power to

act for the Protector in his absence or presence.

For the purposes of this review, it is sufficient to hold— (First) That the the Assistant Protector is not empowered by the Law, and no acting appointment was produced authorising him to perform any duties imposed by sec. 30 or 31 on the Protector; (Second) That the Resident Magistrate, Durban, had power to punish and take other action under the 31st section against the Indian immigrant whom he discharged, such Indian not being on his way to lodge a complaint, but neglecting to return to his master, and having no duly signed ticket of leave.

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WRAGG, J.: The Durban Magistrate had power under section 31 of the Law, 25 of 1891, to deal with this Indian immigrant, who was not free from indenture, was not on his way to lodge any complaint with the Protector of Immigrants, and who was absent from the place of his employment without the written leave of his master.

That section empowers the Magistrate, nearest to the spot where an Indian immigrant is found without his master's written permission to absent himself from service, and who is not protected by the proviso of sec. 30, to punish, after due enquiry, such immigrant absentee. In this case, the man, Ramasami, an indentured Indian immigrant, had already made his complaint at the office of the Protector of Immigrants and had been there told to return to his master's service. He refused to return and, immediately upon such refusal, he became an absentee without his master's leave in terms of the said 31st section and, as such, became liable to be stopped and to be taken before the nearest Magistrate. The Protector of Immigrants is not "such" Magistrate contemplated by that section.

The 31st section instructs the Magistrate how to act as to returning the offender to his employer and as to the costs connected therewith, after he has paid a fine imposed or has completed a term of imprisonment to which he has been sentenced by such Magistrate.

The judgment should be set aside, without costs.

TURNBULL, J.: I agree with my learned brethren.

Per curiam: The Magistrate's judgment set aside, without prejudice to the rights of the respondent, without costs.

[Appellant's Attorney: W. E. SHEPSTONE.]

1892. May 3.

In re THE TESTATE ESTATE OF CHARLES LUNDY.

In re Landy. Executor. Testate Estate. Sale of land—price. Minors' shares. Practice.

Executor testamentary authorised to sell land in which minor interested, subject to such reserve price as might be fixed by the Master. The minors' portions to be paid to the Master.

(In banco.)

The executrix testamentary of Charles Lundy, deceased, applied for leave to sell a piece of land belonging to the estate. There were four minor children entitled to their legitimate portion from the estate, the testator having died in 1883. It was represented that a reserve price, already fixed by the Master and approved by the Court, was too high and could not be obtained.

Bale, for the applicant.

Per curiam: The sale of the land authorised, subject to a reserve price to be fixed by the Master. The minors' portions to be paid to the Master.

[Applicants' Attorneys: BALE & GREENE.]

1892. March 4 & 11. May 28.

In re The

Ladysmith Gold Mining Co. (Ld.) In re THE LADYSMITH GOLD MINING COMPANY, LIMITED.

Company. Winding-up. Call on Shareholders to adjust claims between themselves.

Shareholders placed on the list of contributories of a registered Joint Stock Company in liquidation, having been judicially declared to be liable to a call for payment of the debts of the Company, a further call was made upon them for adjustment of claims between contributories, being the expenses of an attempted amalgamation of the Company with other undertakings. At the hearing of objections to this call on behalf of certain contributories, it appearing to the Court that the objectors (whose

shares had previously been declared forfeited) were either not present at the meeting at which the amalgamation scheme was agreed upon, or had objected to the material adoption of the scheme, and that they had been informed Gold Mining by the Directors that the expense of such scheme would co. (Ld.) be borne solely by the members who were parties to it, HELD:—That, in these circumstances, the objectors could not equitably be made liable for such further call.

March 4, 1892 (in banco, before GALLWEY, C.J. and TURNBULL, J.)

This was an application under sec. 17, Law 19, 1866, on behalf of the Official Manager of the above-named Company for an order authorising a call "levelling up" the payments of contributories to 11/- per share for the purpose of liquidating the claims of contributories upon each other. A call had already been authorised for payment of the outside liabilities of the Company (vide 12, N.L.R., 6).

The claims now sought to be met were in connection with an attempt to amalgamate the property of the Company with that of other gold-mining ventures, for which purpose the Manager of the Company was specially empowered to proceed to England.

Prior to this expenditure being determined upon, the shares of the objectors had been declared forfeited for non-payment of calls. There had, however, been no publication of forfeiture as required by the Articles of Association, the Company, it appeared, being destitute of funds.

The Chairman and three directors now furnished affidavits, from which it appeared that there had been an understanding, at the time when the amalgamation scheme was agreed to, that the expenses incidental thereto would be borne solely by the members who were parties to it, that others whose shares had been forfeited would not be liable, and that the directors had no desire that such liability should be enforced. This was, apparently, communicated to the objectors, only two of whom were present at the meeting authorising the scheme. Of these two, one was present as proxy of an absent shareholder, and the other recorded his objection. It was further stated on oath by the Chairman that he had personally hoped that the shareholders who declined to participate in the venture of the amalgamation scheme would persist in refusing to con-

March 4 & 11. tribute towards it, believing, as he then did, that the project May 28. would thus prove all the more lucrative to those who did contribute.

In re The Ladysmith Gold Mining Co. (Ld.)

Laughton, for the Official Manager.

Morcom, A.G., for the objectors.

The Court directed the application to stand over for consideration by the full Bench.

Postea, March 11, 1892. (In banco).

Laughton renewed the application, contending that the objectors were liable under the judgment previously given (vide 12, N.L.R., 6) in regard to calls.

Morcom, A.G., cited in re The Natal Boating Company (5, N.L.R., 206); in re North Hallam Beagle Mining Co. (Knight's case) (2 Chan., 321) as to the effect of forfeiture of shares.

Per curiam: To stand for further answering affidavits.

Postea, May 28, 1892 (in banco).

Laughton cited The Natal Fire Insurance and Trust Co. v. Ripking, N.L.R., 1873, p, 12, as showing that the action of the Directors in declaring forfeiture of shares was ultra vires of the Articles of Association. In the present case there had been nothing more than a threatened forfeiture which was not sufficient. (Good Hope Syndicate v. Alcock, 11, N.L.R, 145.)

Morcom, A.G., in reply, was stopped by the Court.

GALLWEY, C.J.:—The Court, after hearing the affidavit sworn by the Chairman of the Company, consider that it would be inequitable to hold the objectors liable for a call upon which the directors themselves would not have insisted. The shares had been forfeited, and although the respondents were held liable for calls to pay the debts of the Company, which, I believe, have in fact been paid, they should be discharged from any retrospective liability as past shareholders under sec. 4 of the Winding-up Law, and are therefore not liable for any further call. As to the other contributories who are not opposing this application, I think they should be subject to a call payable in or before the first week of July term, up to the amount asked for Man (11/-) unless cause be shown to the contrary.

r 1**392.** March 4 & 11. May 28.

Wrace, J.:—Although we held that these objecting In re The shareholders ought to contribute towards the payment of Gold Mining outside liabilities, we left open the further question whether co. (Ld.) they ought to be called upon to further contribute for the purpose of adjusting the claims of contributories upon each other. This is, under sec. 27 of Law 19 of 1866, within our discretion, and I am of opinion that it would not be equitable, in all the circumstances, to place any further liability upon the shoulders of these objectors. Indeed, some of the shareholders, amongst whom is the Chairman upon whose petition this Company was ordered to be wound up, who have paid eleven shillings per share, have filed affidavits wherein they aver that they have no desire that these objectors should make any further contribution.

The application should be refused as against those objectors for whom the Attorney-General appears. Their costs, as well as those of the official liquidator, should be paid from any assets which may come to the hands of the said

liquidator.

TURNBULL, J.: I agree with my learned brethren. The objectors to the adoption of the amalgamation scheme have, however, been somewhat, I think, remiss in not taking steps to clear themselves from the Company, and I would be inclined to make the objecting parties pay their own costs in resisting this application.

WRAGG, J.: So far as I am concerned, I should prefer to make no order as against those contributories who have not been represented at the hearing of this application.

Per curiam: As to the six objecting contributories, the application refused. As to the other contributories, a call up to 11/- a share authorised, payable on or before July 7th, unless cause shown. Costs of both parties payable from the assets of the Company.

[Applicant's Attorneys: LAUGHTON & TATHAM. Respondents' Attorney: R. F. Morcom.

1892, May 80. In re THE UMZINTO SHIPPING COMPANY (Limited).

In re The Umzinto Shipping Co. (Ld.)

Company. Winding-up. Appointment of Official Manager.

Delivery of books of account, &c. Remuneration.

Practice.

Discretion exercised by the Court in regard to several proposals for the appointment of Official Manager. Under sec. 18 of the Winding-up Law, books of account, &c., ordered to be delivered up within a month, the transactions of the Company being distant from the Court. No order as to Official Manager's remuneration.

May 30th, 1892. (In banco).

This Company had been placed in liquidation by order of the 2nd April.

Hathorn, for the petitioning creditor, now moved for the appointment of William Champion as Official Manager. He produced an agreement of several creditors and shareholders in favour of Mr. Champion, who had been the Managing Director of the Company.

Bale, for E. E. H. Bradley, a shareholder and creditor, moved for the appointment of T. C. Mitchell, as an independent person not connected with the Company, and an experienced accountant. [He cited the following authorities: in re the North Durham Banking Co. (Fisher's Dig. Col. 677); Natal and Gold Fields Coaching Co. (9 N.L.R., 41) in re

5 Chan. Div., 597); in re N. Assam Tea Co. (ibid, 644); ex parte Charlesworth (36 Chan. Div., 299). Albert Average Assurance Association

Laughton, for David Douglas, a creditor, and others, urged the appointment of some independent and competent person.

WRAGG, J.: I think that we shall be exercising a sound discretion, if we appoint Champion and Mitchell as joint official liquidators of this Company.

As to costs, I think that, in the peculiar circumstances of the connection between Champion and Storm, Bradley was quite justified in bringing the matter before this Court, and that the costs of the objections should come out of the assets of the Company.

Several names having been suggested, the Court appointed William Champion and Thomas Carlyle Mitchell as joint official managers, upon their giving security to the Umrinto Master's satisfaction each in the sum of £4,000, within 14 Shipping Co. days. The Court inimated that no order fixing the rate (Ld.) of remuneration (sec. 20) would be made at the present stage. An order under the 18th section, for the delivery of books, &c., was not made absolute until the 1st day of July term. Costs of all parties to be paid from the assets of the Company.

May 30.

[Attorneys for the petitioning creditor and W. Champion: DILLON & LABISTOUR.

Attorneys for E. E. H. Bradley: BALE, GREENE & WYLIE. Attorneys for D. Douglas and other creditors: LAUGHTON & TATHAM.]

In re RADEMAN v. MARGARY AND ANOTHER (ex parte Anderson & Watt).

May 30. In re Rademan v. Margary.

Taxation. Remittal to Master.

Upon application for review of the Master's taxation, new facts being brought in evidence, bill of costs ordered to be referred back to the Master for his taxation in the light of such fresh evidence.

(In banco.)

This was an application for review of the taxation of the plaintiff's attorney's bill against his client in the abovenamed cause. The question at issue was as to the attorney's travelling expenses from Newcastle to instruct counsel at the hearing of the review (vide 13 N.L.R., 27), which it was alleged had been a matter of previous agreement.

Bale, for applicants, Anderson & Watt, read fresh affidavits as to the alleged agreement.

Coldridge, for the respondent, Rademan.

v. Margary.

GALLWEY, C.J.: The Court is placed in this position—it is asked to review the Master's decision upon affidavits In re Rademan which were not before the Master. Can we review the taxation under such circumstances?

WRAGG, J.: Let the bill be remitted to the Master.

Per curiam: Referred to the Master to tax the bill upon the new facts adduced.

[Applicant's Attorneys: ANDERSON & WATT, Newcastle. Respondent's Attorneys: Boshoff & Coldridge.]

Moller & Co. and Greatrex & Son v. Levy

E. M. Moller & Company (Applicants) v. Charles G. LEVY (Respondent) and C. GREATREX & SON (Applicants) v. CHARLES G. LEVY (Respondent).

Landlord and Tenant. Hypothec for rent. goods on premises of.

Goods consigned to an auctioneer, for sale by public auction, or otherwise, on account of the consignors, held not to be liable to the landlord's hypothec for rent, though remaining on the demised premises for so long a period as 18 months.

April 12, 1892. (In camera, before GALLWEY, C.J.)

These applications, which were heard together, were for an order releasing from attachment certain goods belonging to the applicants on the premises of F. W. Johnson, of Pietermaritzburg, auctioneer, and attached for rent due, and for Borough rates paid by the landlord.

It appeared that the goods, consisting of saddlery and sewing machines, had been consigned to Johnson at various times, in some instances as far back as September, 1890, for sale, either by public auction or privately, a price being quoted, not, however, in all cases to be adhered to as a reserve. Account sales were rendered by the auctioneer after the disposal of portions of the consignments.

Cameron, for applicants.

Bale, for respondent.

The application was ordered to be brought before the full Court.

1892. April 12. May 31.

Postea: May 31, 1892. (In banco).

Moller & Co. and Greatrex & Son v. Levy

W. Burne, for applicants: The landlord's hypothec for rent does not attach to goods in an auctioneer's sale room merely because the goods are there. It is known to every one that auctioneers sell goods belonging to other persons, so that the landlord cannot have been misled. The degree of permanency has to be considered (Henderson v. Waldron & Co., 6 N.L.R., 89). Goods left to be repaired, or cloth left at a weavers or dyers, are not ipso facto liable for rent (III. Burge, 591; Van Leeuwen, R.D.L. (Kotze), Bk. IV., Ch. 13, sec. 12). No storage has been charged, but the proportion of the auction duty appears in each account rendered by the auctioneer.

[He was stopped by the Court.]

Bale, for respondent: It is for the Court to determine as to the degree of permanency necessary to fix the lien, having regard to the words used in the books, "animo manendi," "ut ibi sint." In Henderson's case (vide supra), the goods had been upon the premises for two months, but here some of the articles were with Johnson for 18 months, during the whole of which period they have had the protection of the landlord's premises. The goods purport in the invoices to be sent "on consignment." As to the Borough rates, included in the interdict, the rule is even stricter (Law 19, 1872, sec. 116). The prima facie exemption shown in Henderson's case (vide supra) has been rebutted in the present case. [He also cited Pothier, cont. louage; Lazarus v. Dowse, 3 Juta, 42; Hook v. Singer Manufacturing Co. (11 N.L.R., 301).

Burns, in reply.

GALLWEY, C.J.: The interdict in question was granted by me, and an application being made to me in Chambers for its dissolution, I did not consider that there was sufficient evidence to show how the goods came into Johnson's hands, and how they were treated while in his possession. The further affidavits now put in convince me that the applicants simply entrusted the goods to Johnson as an auctioneer, for sale out of hand if possible. Although not so sold, the goods were never in Johnson's hands as a commission agent. With regard to the rates, sec. 116, Law 19,

Moller & Co.

1872, applies only to proceedings taken by a Municipal Corporation, and does not extend to the landlord's lienthat is saved afterwards, in the same Law. Under all the circumstances, it would, I think, be inconvenient to depart and Greatest circumstances, it would, I supra), or to hold that goods sent to an auctioneer for sale are not in a different position from goods sent to a shop or warehouse in such a manner as to justify the landlord in believing that they belonged to his tenant.

> WRAGG, J.: I also think that the goods in question were in the possession of Johnson as an auctioneer, and that he dealt with them only as an auctioneer.

> TURNBULL, J.: Although I did not hear the arguments, I have read the papers, and I have arrived at the same conclusion.

Per curiam: The attachment removed with costs.

[Applicants' Attorney: W. BURNE. Respondent's Attorney: H. Bale.

1892. May 31. Naicker v. Naicker.

A. K. NAICKER (Applicant) v. K. M. NAICKER (Respondent).

Interdict. Pending action.

Interdict refused, summons having been issued and served in an action.

(In banco).

This was an application for an order interdicting the respondent from receiving rents from lands belonging to the applicant, pending result of an action between the parties. The facts appeared to be materially in dispute.

Summons in the action had been issued and served.

W. Burne, for applicant.

Pitcher, for respondent.

Weage, J.: Why should we interfere on one side or the other?

Naicker v.

GALLWRY, C.J.: I think we must let you proceed with Naicker. your action.

The Court made no order.

[Applicant's Attorney: W. Burne.

Respondent's Attorney: W. E. SHEPSTONE.]

MAHOBOTSHANA (Appellant) v. John Lucas, (Respondent.)

1892. May 28 & 31.

Review. Practice. Evidence.

Mahobotshana

Where it appeared to the Court, upon the hearing of a review, that the Magistrate had decided the case without the production of material documentary evidence, such evidence ordered to be produced to the Court, and, not being forthcoming upon the last day of term, order made for its production before the Judge presiding at an approaching Circuit Court.

May 28. (in banco.)

This was a review of the judgment of the Acting Resident Magistrate of the Lower Tugela Division, in favour of the respondent (plaintiff in the Court below.)

W. Burne, for appellant, referred to an admission by the plaintiff that entries of his transactions were usually made in a book, and stated that he had failed to produce the book in the Magistrate's Court though called upon to do so.

Pitcher, for respondent.

WRAGE, J.: We ought to see the book. I do not think that the Magistrate should have decided the case without its production.

GALLWEY, C.J.: In mercy to the litigants, we think it will be sufficient if the book be produced to us here.

. 1892. May 28 & 31. Postea. May 31. (In banco).

Mahobotahana v. Lucas.

The book not being forthcoming, the Court ordered its production before the Judge presiding at the approaching Durban Circuit Court. Costs of the day granted to the appellant unless cause shown to the contrary.

[Appellant's Attorney: W. BURNE. Respondent's Attorney: W. E. PITCHER).

1892. June 7. THE INSOLVENT ESTATE OF RICHARD DANGER DICKER.

In re Dicker.

Insolvency. Debtor's Petition.

The averment in a debtor's petition, that the petitioner has become insolvent "without fraud or dishonesty on his part" held to be material.

(In camera, before GALLWEY, C.J.)

Mason presented the petition of the above named debtor.

GALLWEY, C.J., noticed that the words "and without fraud or dishonesty on his part," in the form of debtor's petition provided in the 6th schedule to the Insolvency Law, had been omitted. His Lordship intimated that these words were material, and directed the application to stand over.

Postea: July 6. (In banco, before GALLWEY, C.J., and WRAGG, J.)

The application was again refused, and upon the same grounds.

Order accordingly.

[Applicant's Attorneys: HATHORN & MASON.]

In Te The Testate Estate of Jacobus Gerhardus Hatting,

1892. June 26.

Transfer Duty. Exemption. Law 19, 1883.

In re Hatting.

A testator bequeathed a certain farm to three of his children, jointly "for the sum of One Thousand Five Hundred Ponnds sterling, to be paid by them into the estate on behalf of the joint heirs." A codicil apportioned the homestead and cultivated lands to one of the three sons "for which he shall pay Two Hundred and Fifty Pounds sterling into the estate." Held: per Gallwey, C.J.: That the fact of the bequest being charged with these payments was not a "valuable consideration" within the meaning of Law 19, 1883, schedule 1, sec. (d), and that transfer could therefore pass to the heirs free of duty.

(In camera, before GALLWEY, C.J.)

Jacobus G. Hatting, by his last will dated 23rd August, 1880, nominated his wife and his nine children to be his heirs, in equal shares. Certain land, however, was bequeathed to three of the sons, subject to their contributing a sum of money to the joint estate, as indicated in the headnote.

Upon transfer of the land being sought, exempt from transfer duty, the Registrar of Deeds required payment of duty.

Mason, for the applicants, claimed that under Law 5, 1860, schedule 1, sub. sec. (b), the shares of the children ab intestato would so far be within the exemption. He contended, however, that the transfer was entirely free from duty under Law 19, 1883, schedule 1, sub. sec. (d) as there had been no valuable consideration given or taken, and the stipulated payment merely operated as a diminution of the bequest. [He cited in re Watson, 6 N.L.R., 259.]

Morcom, A.G., for the Registrar of Deeds, argued that the transaction was not covered by the exemption in the Schedule to Law 19, 1883.

GALLWEY, C.J.: The question is, whether when a father leaves property to his sons, by will, charged with payment of a debt, that is a "valuable consideration"? Is it be-

cause the land is encumbered that the transfer becomes liable to duty? I think that Watson's case (vide supra) is In re Hatting binding, and that I must hold that under such circumstances there is an exemption from payment of transfer duty. Common sense seems to support such a view.

> Order:-The Registrar of Deeds authorised to register transfer, free of duty, to the heirs of the estate.

> > [Applicant's Attorneys: HATHORN & MASON.]

NATAL LAW REPORTS

(NEW SERIES) VOL. XIII., PART IV.

JULY, 1892.

ELIZABETH DREW (Plaintiff) v. MARY DREW AND OTHERS (Defendants).

1892. Jan. 13, 14, & 16. July 1.

- Succession. Life interest. Omission of name of heir. Blank Drew v. Drew. in will. Intestacy. Deferred inheritance. Time of vesting.
- A testator, married in community, dying without issue, bequeathed to his wife the whole of his estate "for her own use and benefit" during the term of her natural life or her widowhood. Upon her death or remarriage, the will directed that the property should "become the property of"———[Here there was a blank, and the will proceed with a devise to the wife of money in the bank.] HELD: That under this will, the widow, by virtue of the community, was entitled to half the joint estate of That the widow was entitled to a life interest, durante viduitate, in the testator's half-share of the property so devised. That in the absence of any indication in the will of who was to inherit, there was an intestacy us to the ultimate inheritance to the property, and that therefore, upon the widow's death or remarriage, the estate would be distributed ab intestato.
- 2. A testator, being a natural-born British subject, married in England, by his will, executed under Ordinance 1, 1856, devised his estate to an executor and executrix upon trust for his wife, during her life or widowhood, to receive the income for the maintenance of herself and

Jan. 18, 14, & 16.
July 1.

Drow v. Drow.

the testator's children. In the event of a second marriage, then upon trust to let or sell the property, the interest or rent to be paid, as to one-third, to the wife for her own use and benefit, and, as to two-thirds, to be applied to the maintenance, &c., of the children. After the decease of the wife, upon trust to sell the property and to divide the proceeds between the children in equal shares, to be paid to them on attaining 21 years, HELD: That although there was no gift to the children but a direction to divide in the event of the widow's death, the vesting in the children took effect from the testator's death and was transmissable to the legal representatives of the children, though not payable until the death of the widow.

January 13, 14 & 16, 1892. (In banco).

This was an action, upon an agreed statement of facts, for a declaration of the plaintiff's rights under the will of her husband, Ernest Oliver Lewis George Drew, which included the question of the plaintiff's interest, through her husband, in the estate of the latter's father, George Drew.

The facts will be gathered from the judgment afterwards delivered.

Laughton, for plaintiff, argued that under the will of George Drew the gift to the children, though deferred until the death of their mother, vested at once (Theobald on Wills, Ed., 1885, p. 381). The will should be interpreted, by English Law, as creating a trust not involving a fidei commissum. A testament ought to be construed against disinheritance. [He also cited Remnant v. Wood, 30 L.J. (Eq.) 71, cited in Lewin on Trusts (Ed. 1875) 397.] As to the will of E. O. L. G. Drew, counsel argued that as the devise in trust had not been completed, the trust failed, and the widow as fiduciary heir took the whole estate.

Mason, for defendants, contended that there being no determination in E. O. L. G. Drew's will for the disposal, after the widow's death, of the testator's estate, it should be administered ab intestato (Bishop of Cloyne v. Young, 2 Vesey Sen., 91; Lord North and Guildford v. Purden, ibid, 494; in re Bacon, 31 Chan. Div., 460; in re Harrison, 30 Chan. Div., 390; in re Herold, 1 Juta, 166; Watson v. Watson, 7 Prob. Div., 10; Sande, Decis., 4.5.2; Dig. 29.7.3).

He also cited Caffyn et ux v. Heurtley's Executors (1 Menz., Jan. 13, 14, & 178); Smith v. Waller and Bowlby (1 N.L.R., 81, 198).] The will of George Drew, he contended, gave a bequest to executors in trust, and there was therefore no bequest to Drew v. Drew. the children as heirs, the trustees being fiduciary owners and the children only fidei commissary heirs, with no vested interests (Grotius, 2.20.5; in re Milne (1 N.L.R., 88); Barker v. Barker, 16 Chan. Div., 44; 44 & 45 Vic. c. 51; Marshall v. Gingell, 21 Chan. Div., 790; De Jager et uw v. Muller's Executor's, Buch. Rep., 1872, p. 52; Lucas v. Hoole, ibid, 1879, p. 132; Morrison v. Morrison's Executors, ibid, 24; Raal v. De Jager, 1 Juta, 38; Oosthuysen v. Moffat, 5 Juta, 14; Hiddingh v. de Rouhaix, 3 Roscoe, 11; Dig. 3.4.2.15; Sande, Decis., 5.1.2; Voet, 16.3.13, 7.1.5, & 7.1.13; Grotius, **2.20.1**, & 5.9.14).

July 1.

(Our. adv. vult).

Postea: July 1. In banco. Before GALLWEY, C.J., and Wragg, J.

The judgment of the Court was delivered as follows by—

GALLWEY, C.J.: This action is brought to obtain a decision on the construction of two wills, and a declaration of the interests of the parties to the suit under these wills.

The parties agreed to lay their case before the Court on a statement of facts, and submit and argue their claims in that statement. The first and principal will is the will of Ernest Oliver Lewis George Drew, who was married in community with his wife Elizabeth Drew. There was no issue of the marriage. The will was dated 6th May, 1890, and was registered on 20th May as a proved will.

The testator bequeaths to his wife, Elizabeth Drew, the whole of his property during the term of her natural life

or for so long as she should remain his widow.

Ernest O. L. G. Drew was married in community, was domiciled in Natal, his power of disposition extended alone to a moiety of the joint estate, and the will operates on his moiety alone (Caffin et Uxor v. Heurtley's Executors, 1 Menz., 178; Smith v. Waller and Bowlby, 1 N.L.R. (1880), p. 81.

The Law 7, 1885, enacted that every person competent to make a will after 30th September, 1885, had full power to omit to mention or disinherit any child, parent, relative or descendant. The plaintiff is therefore entitled to a declaration, that half the joint estate belonged to her under the marriage in community of goods. That the will only applies to the testator's half-share in that estate, and that Jan. 13, 14, & 16.
July 1.
Draw v. Draw

the plaintiff is entitled to a life interest durante viduitate in the testator's half-share of the property as devised. One is disposed to adopt the golden rule—"if possible to read a million of the property as devised.

will so as to lead to testacy and not to intestacy.'

The intention of the testator was to give his wife only a life interest in the estate or durante viduitate, which is the interest given her by the will, and the testator proceeded to give over the estate upon her death or marriage, but omitted to name the legatee. He could not well name the wife. The will was a written one, a blank space intervening. The testator reserved power to make alterations or additions to the will.

He never filled in the blank space or explained it by any addition.

The will was not on a printed form in which the blank space was contained, but was drawn up for the purpose of this particular will, and limited the bequest to the wife to a life legacy and did not therfore intend to insert her name in the blank space. In the absence of any indication in the will as to who was to inherit, in my opinion there was an intestacy, and the property must be distributed on the widow's death or marriage as an inheritance ab intestato (1 Knapp, 231). Under a further devise the testator gives to his wife all monies standing to his credit in any Bank in this Colony, and money or property which may be devised to him. All such moneys in any bank or moneys or property devised to him the widow is entitled to absolutely by virtue of community and of the bequest under the will.

The will is not clearly expressed, but adopting the wider rule to read a will to lead to testacy we declare that under the will of George Drew, married in England, dated November 1876, and duly registered on the 2nd day of December, 1876, he devised his property to an executor and executrix, and that under that will his widow, Mary Forrester Drew, is entitled to the income and benefit arising from all his estate and business for the education and maintenance of herself and his children for her lifetime and widowhood, and after her marriage to sell or let all his property and invest proceeds at interest, and to pay such rent or interest, one-third to his widow, for her own use, power is given to the executors to apply two-thirds for the maintenance and education of the children, and after the decease of his wife, to sell, and if sold, to divide all principal moneys to the children in equal shares, to be paid to them on attaining the age of 21. A general proposition in the construction such a bequest is, that when there is no gift to the children, but a direction to divide on a given event, namely, the death of his widow, then the rule of interpretation of wills unless from particular circumstances a contrary intention is to be collected. Sir W. Grant in Leake v. Robinson (2 Mer. 363) decided that when there was no gift, except Drew v. Drew. in a direction to divide, the direction was only in effect to such of the legatees as attained the prescribed age, and if there were the words in this will "as will be alive at death of wife" there would be no vesting till then.

The Law favours the doctrine of legacies being deemed vested, i.e., that property the subject of disposition will belong to the donec as soon as the instrument making the gift may take effect, as in a will, on the death of the testator.

Under this will there is no other gift of the entire estate than in the direction to pay and divide the entire estate on the death of the wife. Until then or her remarriage the trustees are to permit the interest to be taken for the maintenance, education and support of herself and children. The payment and distribution it seems to me was defined for the purpose of giving precedence to the production of a sum of money for support of wife and children during her widowhood. It is also settled law, that although there be no gift of a legacy previous to the period appointed for its payment, yet if the intermediate interest be given to the legatecs or directed to be applied as here, for the mainten-

vest the legacy upon the death of the testator (Roper, 582). A case was decided before Vice-Chancellor Wigram 14 L.J. Chan., 191 (Packham's case) in which the facts were very similar to the present. I refer to it at some length, for that reason and also because the decision was based on the principles contained in the Civil Law.

ance and education of the children, afterwards as legatees called "my children," such circumstances will prima facie

There the testator gave the residue of his personal estate to trustees to sell, invest and pay interest of invested funds to testator's wife, for her life if she should continue his widow, and from and after her decease or remarriage he directed the trustees to pay and divide the money so invested unto and among all testator's nephews and nieces within six months after they became entitled thereto.

The testator died in October, 1830. In January 1831 the will was proved. In February 1821 one of the testator's nephews had died without issue. In September 1842 the testator's widow married again. She took out administration to the estate of the deceased nephew. She filed a bill in Equity praying that her rights as administratrix of the deceased nephew might be determined. Held, that the share of the deceased nephew became vested at the death

July 1.

July 1.

of the testator and that his representatives were entitled thereto. Vice-Chancellor Wigram is reported in his judgment to have said, "That Courts of Equity in the construc-Drew v. Drew, tion of wills relating to personal estate follow the rules of the Civil Law, and by that Law where the legacy is given absolutely and the payment postponed to a future definite period, the Court considers the time as annexed to the payment and not to the gift of the legacy, and treats the legacy as debitum in praesenti solvendum in futuro." The many cases of such conclusion are found in Van Leeuwen's Roman-Dutch Law, Book 3, c. 9, sec. 34, and the following canons submitted there, support his dictum and conclude the judgment in the case.

> "But if the day or time mentioned in the condition is certain to arrive, although it is uncertain when it will do so; as if, I said 'I institute John my heir provided that at his death, should he have re-married, Peter shall be paid a thousand guilders once,' it is understood that the right thereto commences with the death of the testator, so that if the legatee happens to die before the day of payment he transmits the right to his heirs: which is to be understood in like manner in the case of an inheritance after the death of another who has in the meantime the usufruct."

> "So, too, if the testator has said "I bequeath one thousand guilders to my niece which my heir shall pay her on attaining majority or marriage," which bequest, even if the niece dies unmarried and a minor, must be paid to her heir."

> In my opinion therefore the legacy to E. O. L. G. Drew became vested at the death of his father, and is transmissable to his legal representatives. The question whether it was included among the specific bequests to his widow is not raised in this action.

WRAGG, J.: I have come to the same conclusion.

The following minute of judgment, prepared by TURN-BULL, J., who was absent on Circuit, was adopted by the Court :---

Without having recourse to any other than Roman Dutch Law and the authorities thereunder referred to by His Lordship the Chief Justice, I am of opinion that:—

(1) The plaintiff, Elizabeth Drew, is by reason of her community therein, entitled absolutely to one half of the property in the joint estate of herself and husband at the time of his decease.

(2) She is also absolutely entitled under his will to her husband's property in all monies which were standing to his credit in any bank in this Colony, and to any money or property which might at any time be Drew v. Drew. devised or bequeathed to him.

July 1.

- (3) She is also entitled under his said Will, so long as she remains his widow, to the use and benefit of all the remainder of her husband's half-share in the said joint estate.
- (4) On the decease or re-majriage of the plaintiff, the property of her husband, of which, until the happening of either event, she is to have the use and benefit, would be divided amongst the husband's next of kin according to the rules regulating the distribution of an intestate's estate.
- (5) I am of opinion that plaintiff's husband was entitled to a child's share under the will of his father George Drew, payable to him or his heirs on the death of Mary Drew who is still living.
- (6) I approve of the sale by public auction under the direction of the Master, of the lot 25 in terms of the consent of the parties; any balance of the purchase price to be dealt with as hereinbefore mentioned with regard to property in the joint estate of the plaintiff and her deceased husband.
- (7) As by the accounts it would seem that more has been expended by the plaintiff in connection with the liabilities of the joint estate, than what she has received in the way of revenue from the estate, I consider that what monies she has thus advanced should be recouped to her out of the funds of the joint estate.
- (8) The costs of this submission to be paid out of the joint estate.

Per curiam: Order accordingly.

[Plaintiff's Attorneys: LAUGHTON & TATHAM. Defendants' Attorneys: HATHORN & MASON.] July 1.

Grandin v.
Cato's
Curators.

- CHARLES GRANDIN (Plaintiff) v. THE CURATORS OF THE PERSON AND PROPERTY OF GEORGE CHRISTOPHER CATO (Defendants).
- Trial. Postponement. Absence of material witness. Interdict pendente lite.
- Trial of cause postponed on account of absence of material witness. Plaintiff in action interdicted from alienating or otherwise dealing with land the subject matter of the action.

(In banco). Before GALLWEY, C.J., and WRAGG, J.

Bale, for plaintiff, moved for an order postponing the trial of the above-named cause, set down for the 18th inst. Mr. W. E. Shepstone, a material witness for the plaintiff, had left the Colony temporarily on account of ill-health. The action involved questions as to the competency or otherwise of Mr. G. C. Cato to contract, and this was represented as being peculiarly within Mr. Shepstone's knowledge as Mr. Cato's adviser and personal friend.

Morcom A.G., for defendants, opposed, the time of the witness's absence being uncertain, and it being undesirable to indefinitely postpone the trial as the witnesses were becoming dispersed.

Per curiam: The trial postponed until the 26th September.

Morcom, A.G., applied for an interdict restraining the plaintiff from disposing of certain land during the pendency of the action. The validity of the transfer by G. C. Cato to the plaintiff of the land in question was a matter in issue between the parties.

Bale complained that no notice of this application had been given, and he had therefore not received instructions to oppose.

Per curiam: The plaintiff interdicted until further order from alienating or otherwise dealing with the land the subject matter of the action. Costs to be costs in the cause.

[Plaintiff's Attorneys: GOODRICKE & SON.

Defendants' Attorneys: Hathorn, Mason & Churchill.]

James Cole (Appellant) v. The Deputy Clerk of the Peace, Dunder (Respondent).

July 6.

Cole v. Clerk of Peace.

- Liquor. Licensed Premises. Keeping open for sale during prohibited hours. (Ord. 9, 1847, sec. 24).
- Sec. 24, Ordinance 9, 1847, enacts "that no retail dealer shall sell, or keep any tap, canteen, or public-house open for the sale of" the liquors referred to in the Ordinance, between certain hours.
- A billiard-room, under the same roof as a licensed canteen, but with a separate outer entrance, was divided from the bar by a wooden partition, with a door having fastenings on the inside of the bar, and a sliding window, with a counter, between the two rooms. During prohibited hours, the billiard-room was found to be lighted-up and play going on, several persons, including the barman (who was also billiard-marker) being in the room. The main or front entrance of the bar was closed, and it did not appear that liquor had in fact been sold, nor that the door or sliding window were actually open.
- HELD: In these circumstances, that the licensed dealer had been rightly convicted for keeping open his premises for the sale of liquor, within the meaning of the said section.

(In banco.) Before GALLWEY, C.J. and WRAGG, J.

This was an appeal from a conviction of the appellant by the Magistrate of Dundee, upon evidence of the facts above indicated.

Laughton, for appellant.

Morcom, A.G., for respondent.

GALLWEY, C.J.: The question before the Court is whether or not the Magistrate was right in finding that there had been a contravention of sec. 24, Ordinance 9, 1847. Now, there is no doubt from the evidence that the billiard-room and the licensed canteen are adjoining rooms under one

July 6.

Cole v. Clerk of Peace.

roof, and that the bar had both an outer and an inner door, the former being closed on the evening in question. But there was not only a door between the bar and the billiard-room, but also a sliding window, with a counter, evidently intended for supplying liquor from one room to the other. The Magistrate found as a fact that, in these circumstances, the bar was being kept open for the sale of liquor, and I cannot disturb his finding, as it seems to me that the bar was being so kept open as an adjunct to the billiard-room, and in order to make the latter a profitable concern. The shutting of the outer door of the bar was a mere blind, so long as the window between the two rooms could be used for the purpose of selling liquor contrary to law.

Wrage, J.: In my opinion there has been a contravention of the 24th section of the Ordinance No. 9, of 1847. It is true that the outer door of the bar-room was shut and that the lights in that room had been put out. But, there was a dividing partition between the bar and the billiard-room, and in that partition there was a window, beneath which, on the bar side, was a counter: the billiard-marker, then on duty, was also barman. He, presumably, kept control of the liquor, and it appears to me that it would in no wise be a difficult matter to introduce, through that window, liquor for the persons in the billiard-room. Two of the witnesses, who were in the billiard-room at the time, say that they had no liquor in that room, but they are silent as to liquor being supplied to them from the bar, and that silence seems to me to be very suspicious.

The whole evidence convinces me that the bar was, in fact, open for the sale of liquor, and that the Magistrate was therefore right in convicting the licensed dealer.

Per curiam: Application refused.

[Appellant's Attorney: A. A. Smith, Dundee.]

ROLAND SCUDAMORE MEEK (Plaintiff) v. THE COLONIAL GOVERNMENT OF NATAL (Defendant).

July 6.

Meek v.
Colonial
Government.

Pleading. Exceptions. Issues of fact. Damages.

Upon exceptions raised to defendant's plea in an action against the Colonial Government for damages in connection with Railway construction, it appearing to the Court that it would be inconvenient to decide, at so early a stage and without hearing evidence, upon the important issues raised in the pleadings, involving questions of damages, it was ordered that the case should proceed to trial.

(In banco). Before GALLWEY, C.J., and WRAGG, J.

The plaintiff claimed from the Colonial Government £575, in respect of improved land taken for the purposes of the railway constructed under Law 5, 1888, lying within the 100 feet width, and in respect of numerous items of damage as to land outside such width.

The plea denied that any land had been permanently taken outside the 100 feet, to which width, however, the defendant claimed that the Government was not restricted by the provisions of Law 5, 1888, or any other law incorporated therewith. The defendant also averred that the plaintiff was not, except in the case provided in his title deeds, entitled to any compensation for the land taken for the purposes of the railway. Also, that the damage alleged, if sustained, did not give any right of action against the Government.

The plaintiff excepted to the averments above indicated in italics.

Bale, for plaintiff, in support of the exceptions, after referring to the legislation on the point, contended, interalia, that the width of a "main road" could not exceed 100 feet, the Natal Government Railways having been declared to be a "road." With regard to damage sustained outside the 100 feet, compensation had to be determined. [He cited Chick v. Colonial Government, N.L.R., 1877, p. 1; Colonial Government v. Natal Land and Col. Co. (Ld.), 8 N.L.R., 54, and 10 N.L.R., 112; Ralfe v. Colonial Government, 11 N.L.R., 241; Freeman v. Colonial Government, 9 N.L.R., 181, and 10, N.L.R., 71; Raw v. Colonial Government, 6 N.L.R., 48.]

July 6.

Meek v.
Colonial
Government.

Morcom, A.G.: The railway is declared to be a public road, not a main road, and its width is not defined by Law 5, 1888, or by any other law applicable. The only law incorporated with Law 5, 1888, in regard to compensation, is Law 16, 1872, and the latter is "expressly varied" by sec. 5 of the former law. As to the second exception, the averment excepted to cites almost the exact words of sec. 11, Law 5, 1888. The exception to the averment that the damage, if proved, gives no right of action is wrongly brought before the Court, as the plaintiff can only sustain it upon an admission of facts stated in the declaration which are not admitted.

Bale, in reply: The last-mentioned exception is to an averment of law wrongly brought into the plea.

GALLWEY, C.J.: This is the first case of a claim for compensation under Law 5, 1888. There has been a reference to somewhat conflicting authorities, and the question of damage raises so many points that we are very unwilling to give any decision until the action shall have come before a Court or a jury, for a declaration of what is really claimable by way of damages. The case is a very important one, and it would be most inconvenient for us to express any opinion now.

Wrags, J.: I think that it would be very inconvenient that we should now say more, upon the important points raised in the pleadings, than that we are of opinion that the case should go to trial, costs of both parties to be costs in the cause.

Per curiam: Order accordingly.

[Plaintiff's Attorneys: Anderson & Watt, Newcastle. Defendants' Attorney: R. F. Morcon.]

In re FREDERICK BUTTON.

July 6.
In re Button.

Transfer. Application for amendment of Deed.

Application to amend a deed of transfer, by substituting another name as transferee, refused, it appearing that the declarations in the Registrar of Deeds' Office were in accordance with the existing deed.

(In banco). Before GALLWEY, C.J., and WRAGG, J.

This was an application by Frederick Button, for an order authorising the Registrar of Deeds to substitute his name for that of James Thomas Button, as the transferee in a certain deed of transfer. The applicant claimed that the land had in 1882 been bought on his behalf, in accordance with his instructions, at public auction, and that he had since that time exercised all the rights of a proprietor, but that he had ascertained that the conveyancer had wrongly passed transfer in favour of J. T. Button.

The Registrar of Deeds declined to alter the deed with-

out payment of transfer duty and fees of office.

Bale, for applicant: There was undoubtedly carelessness in the conveyancer's office, but the deeds never came into possession of the parties interested in the property. It could not have been intended by the legislature that a mistake of this kind should involve so severe a penalty. The applicant had already been a heavy loser, as he has paid off bonds exceeding the value of the property. His action has throughout been consistent with the original intention of the parties. (He cited in re Mayne, 1 N.L.R., 157).

Morcom, A.G., for the Registrar of Deeds: This point has been concluded by in re Courtney Acutt (9 N.L.R., 60). The parties have made solemn declarations upon which transfer duty has been paid, and they cannot afterwards come to the Court for an order to deprive the revenue of the duty paid on those declarations.

WRAGG, J.: I have no doubt in my mind that the matter happened as the applicant says: the difficulty has, I think, been chiefly caused by his want of business accuracy. However, I consider myself bound by the decision in *Acutt's* case (vide supra), and I am, therefore, unable to grant the order for which we are asked.

July 6.

In re Button.

GALLWEY, C.J.: The decision in Acutt's case (vide supra) appears to have overruled that in Hyde v. Mackenzie (8 N.L.R., 249), as the latter case would appear to justify the order now asked for. We think, however, that the Attorney-General should not press the imposition of any fine for non-payment of duty.

Per curiam: Application refused.

[Applicant's Attorneys: Bale & Greene.]

July 6, Surveyor-General v.

Remfrey.

THE SURVEYOR-GENERAL (Applicant) v. Henry Oliver Remprey (Respondent).

Interdict. Application to set aside. Action contemplated.

"Costs in the cause." Practice.

Costs of interlocutory applications relating to an interdict ordered to be costs in an action which the respondent was placed upon terms to institute. Failing such action, the respondent ordered to pay the costs of the original motion for an interdict, of an unsuccessful application for its discharge, and of a further application in respect of costs.

(In banco). Before Gallwey, C.J., and Wragg, J.

Morcom, A.G., moved for an order granting to the applicant (1) the costs incurred in obtaining an interdict against the respondent on the 24th November, 1890, (2) the costs of an application by the respondent on the 1st October, 1891 (vide 12 N.L.R., 278), for discharge of the interdict, such application having been refused "without prejudice to the bringing of an action by the applicant, costs to be costs in the cause," and (3) the costs of the present application.

Hathorn, for respondent, read an affidavit urging that his client's case depended in a great extent upon the decision in Vos v. Colonial Government, wherein judgment had been reserved. Costs having been made costs in the cause, no order could be made until an action had been brought, it being optional with the respondent to institute such action.

Per curiam: The respondent ordered to bring an action to determine his rights within two months. Failing such action, within such time, the respondent ordered to pay the General .. costs as prayed. In the event of action being brought, the Remfrey. costs in question to be costs in the cause.

1802

[Applicant's Attorney: R. F. Morcon. Respondent's Attorneys: Hathorn & Mason.]

In re The Intestate Estate of Johannes Gradus Schruer.

Executor. Intestate Estate. Objections to Account. Failure In re Schruer. to administer. Children of two marriages.

Objections to the accounts of executors' dative having been referred to the Master, the Court made no order on the Master's report, some of the minors concerned not being represented before the Court, and the matters of dispute being of a very complicated nature. Costs reserved.

(In banco). Before GALLWEY, C.J., and WRAGG, J.

Laughton, for certain objectors, presented the Master's report upon a reference dated the 4th March, as to the circumstances of this estate. The Master had framed an account, compiled from evidence taken before him, showing a balance in favour of the estate much in excess of that appearing in the executors' account. It was shown that the assets of the joint estates of the deceased and his first and second spouses had not been duly administered. A sum of £692, claimed as a set off, was allowed in arriving at the balance found by the Master, but was in dispute. The assets included the supposed property of the joint estate of the surviving spouse and her former husband, brought into the present common estate. Various conflicting and voluminious affidavits had been filed, and the matter was on all sides exceedingly complicated. The minor children of the former marriage were not represented before the Court.

Hathorn, for the executors.

GALLWEY, C.J.: We cannot decide such important matters on the conflicting statements before the Court. I do not

July 7.
In re Schruer.

see how we can interfere. It would be well if the parties could agree to some arrangement, subject to the Master's approval, as to the minors' interests.

WRAGG, J.: The costs of this application could be dealt with in any action which a curator ad litem may bring.

[Ultimately, the Court decided to make no order. The question of costs reserved.]

[Attorneys for the Executors Dative: HULETT & LANGSTON. Attorneys for the Objectors: LAUGHTON & TATHAM.]

July 7.

Jare Allerston

In re The Testate Estate of Francis Allerston.

Executor. Will. Sale of land. Minors' interests.

Executor testamentary authorised to sell land, though contrary to directions of testator, for payment of mortgagees and concurrent creditors, the Master reporting that such sale would be for the benefit of the minor heirs.

(In banco). Before GALLWEY, C.J., and WRAGG, J.

This was an application by the executor of Francis Allerston's will, for leave to sell the landed property of the estate, to provide funds for payment of debts. The will directed that the immovable property should remain intact until the majority of the youngest child, who was still a minor. There were mortgages amounting to £700 on the land, which was practically the only asset, and was valued at £1,050. One of the mortgagees was pressing for payment and there were also concurrent creditors for £250. The Master reported that the property would not bear a further mortgage, and considered that it would be for the minor's benefit that there should be a sale, subject to a reserve of £1,000. The major heirs and several creditors consented.

Greene for applicant.

Per curiam: The Master's report confirmed, and the sale by public auction authorised, subject to a reserve of £1,000.

[Applicant's Attorneys: BALE & GREENE.]

REGINA v. UNCENGANE AND OTHERS (Defendants Appellants).

1866. July 9.

Review. Record of Magistrate's Court. Affidavits.

Regina v. Umcengane and others.

Application for review of criminal proceedings in a Magistrate's Court refused, the grounds alleged being that a plea of guilty had been wrongly entered on the record.

Affidavits to impugn the record rejected.

(In banco).

This was an application for review of the judgment of the Magistrate of Dundee, in a criminal case in which the defendants had been charged with assault. The record of the Court below showed that a plea of guilty had been entered, and the Magistrate in his reasons stated that the charge had been fully explained to the accused through the Court Interpreter, and that, before sentence, having been asked if they had any statement to make, they had replied that they had nothing to say. The main ground of review was that the nature of the charge had not been fully explained to the defendants, whose admission did not amount to a plea of guilty.

Scott, for appellants, sought to put in affidavits in support of these grounds.

GALLWEY, C.J.: It is not for this Court to falsify the Magistrate's record.

WRAGG, J.: We cannot set aside the judgment without finding that what the Magistrate has recorded was false.

Morcom, A.G., was not called upon.

Per curiam: The application refused.

[Appellants' Attorney: W. A. VANDERPLANK, Newcastle.]

1982. July 9. In re James Dominick Dempsey (a minor).

In re Dempsey Minor Child. Custody of. Claims of Parents. Conflicting evidence. Access.

Upon application for removal of an interdict restraining the father of a minor child from interfering with his wife and child, it appearing to the Court that the child had for four years past been properly cared for and educated by his mother, without deciding on conflicting evidence adduced, the Court ordered that the child should remain in his mother's custody, pending further proceedings, the father, however, to have reasonable access to the child.

(In banco).

This was an application by Charles Dempsey for removal of an interdict granted ex parte on the 16th May, at the instance of his wife, whereby he was restrained from interfering with the latter and their son, a minor aged eight years.

Affidavits were now put in by both sides, as to the fitness of either party to have charge of the boy, and were very contradictory. It appeared, however, that the child had for nearly four years been regularly attending a Government Model Primary School, the Head Teacher of which certified that he had made satisfactory progress, his appearance had always been clean and tidy and that of a thoroughly well cared for child.

Gallwey, for applicant, argued that the father's right was paramount, in the case of a child of over seven years of age.

Bale, for respondent, Mary Anne Dempsey, cited Van Leeuwen, Cons. For., 1.15.16, Vact 23.2.14, 25.3.1, and 25.3.20.

WRAGG, J.: In the conflict of evidence as to the main dispute between husband and wife, there is nothing to justify the removal of the child from his mother's custody. It is clear that for four years she has properly maintained and suitably educated the lad, and he should remain with her for the present.

GALLWEY, C.J. (after referring to in re Stocqueler, N.L.R. 1870, p. 55), intimated that he was not prepared to disturb existing arrangements, although the father was entitled to dark Demphor have reasonable access to his child. He remarked that the law of this Colony gave the widest discretion to the Court as to the custody of children, instancing Heslop v. Heslop (11 N.L.R., 251), there being very little difference in this respect between a voluntary and a judicial separation of the His Lordship also referred to Symington v. Symington, 2 H.L. (Scotch cases), 415.

July 9.

Per curiam: Without deciding on the conflicting evidence before the Court as to the main dispute between the applicant and his wife, and as it appears to the Court that for the last four years the child James Dominick Dempsey has been well and properly cared for and educated by his mother, It is ordered: That the mother of the said child shall retain the custody of him pending further proceedings.

2. That the applicant, the said Charles Dempsey, shall

be allowed reasonable access to the said child.

[Applicant's Attorney: W. J. Gallwey. Respondent's Attorneys: Bale & Greene.]

THE SUPERINTENDENT OF POLICE, DUEBAN (Appellant) v LEMAN KATTENBURG (Respondent).

July 12. Supt, of Police v. Kattenburg.

By-Laws—Prosecutor for contra-Municipal Corporation. ventions.

Section 74, Law 19, 1872, empowers the Superintendent of Police of any Borough, or other person toppented by the Council, at his own instance, and without obtaining permission or certificate from the Attorney-General, to prosecute in the Resident Magistrate's Court in the Borough for all contraventions of the Borough By-Laws. Held: That it was not necessary for the Superintendent of Police to have or produce any deputation or authority from the Council for the purpose of such prosecution,

(In banco).

July 12.
Supt. of Police
v. Kattenburg.

This was a review of the decision of the Magistrate for the division of Durban.

The respondent was charged with contravention of a Borough By-Law. His Attorney objected to the Superintendent of Police prosecuting unless he could produce an authority or appointment in that behalf. No such authority was forthcoming.

The Magistrate allowed the objection and dismissed the summons with costs.

In the review, sec. 74, Law 19, 1872, above cited, and a Borough By-Law, No. 128, were relied on, as conferring sufficient authority upon the Superintendent to conduct such prosecutions.

Morcom, A.G., for the appellant. The respondent did not appear.

GALLWEY, C.J.: The Superintendent of Police is appointed the prosecuting officer by Law 19, 1872, sec. 74. Is not this sufficient? There need be no question as to the validity of the By-Law referred to.

WRAGG, J.: The lawyer and the Magistrate were equally wrong, and the former, by not appearing at the hearing of this appeal, has apparently lost heart.

Per curiam: The Magistrate's decision set aside.

Morcom, A.G., asked for costs against the respondent.

GALLWEY, C.J.: It would be very hard to hold the respondent liable for the Magistrate's mistake.

No costs granted.

[Appellant's Attorney: HARRY ESCOMBE.]

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In re The Testate Estate of Arthur Grenville Tucker.

June 27, July 23,

Executor. Testate Estate. Purchase of Assets.

Executors testamentary authorised to purchase assets of estate privately, for a sum sufficient to pay debts and leave a surplus for the heirs, it appearing to the Court that the proposed arrangement would operate beneficially for the minor heirs.

(In banco).

This was an application by the executors of the will of A. G. Tucker, who were also guardians of his minor children, for leave to purchase the assets as above indicated. The assets of the estate appeared, on valuation, to be insufficient to pay liabilities, a considerable sum being due to the executors.

The deceased had carried on business at Newcastle as an Aerated Water Manufacturer, some of the plant having been hired from one of the executors, the deceased's brother, who desired to assist his co-executor, a son of deceased, to carry on the business for the benefit of the widow and children.

The Master reported that the proposal was an extremely liberal one, and could not fail to operate for the benefit of the minor heirs. The widow, who had a life-interest under the will, consented.

Greene, for applicant.

TURNBULL, J., was of opinion that the sale should be by public auction in the usual manner, with permission to the executors to become bidders and purchasers.

GALLWEY, C.J., cited a passage from the judgment of the Privy Council in *De Montmort* v. *Broers* (13 App. Cases, 149—at page 159), and, adopting the language of Sir Richard Couch, intimated that he considered the "compromise" to be one which the Court might sanction, though it could not be considered in the same light as a judgment given by the Court.

WRAGG, J.: That is also my opinion.

Per curiam: Order as prayed.

[Applicants' Attorneys: Bale & Greene.]

July 23.

In re Fisher.

In re Alfred James Fisher and his minor son.

Minor—Property of, occupied by father of. Mortgage for father's basiness.

Leave to mortgage property of minor for the purpose of erecting additional buildings thereon, necessary for a hotel business carried on in the premises by the minor's father. The latter being an uncertificated insolvent, certain precautions, recommended by the Master, adopted by the Court.

(In banco).

This application was for authority to mortgage for £400 Lot A of Erf 9, Pietermaritz Street, the property of Robert Dudley Fisher, a minor of 17 years of age. The property had been acquired under circumstances shown in a previous application (in re Fisher, 12 N.L.R., 19). It was represented that certain outbuildings and improvements were necessary for the hotel business carried on upon the premises by Alfred James Fisher, father of the minor, who was an uncertificated insolvent, no accounts in his estate having been confirmed.

The Master reported generally in favour of the application, but as the creditors had contemplated an action with a view to bringing into the estate the property now sought to be dealt with, he suggested that a meeting of creditors should be called, in order that the proposal should be laid before them. He also advised certain precautions as to

calling for tenders and accounts.

Greene, for applicant.

WRAGG, J.: I think that the safer course would be to call a meeting of creditors, to consider the proposal:

Per curiam: The Master's report confirmed.

[Applicants' Attorneys: Bale & GREENE:]



In re Evett Saunders and his minde son.



Minor—Unauthorised sale of property of. Terms of sanction In re Sauudam by the Court.

Transfer to purchaser of minor's land, sold by father without authority from the Court, authorised, but only upon payment to the Master of the whole purchase price of the land and improvements, for investment in the usual way on behalf of the minor.

(In banco).

This was the renewal of an application which had been before the Court on several former occasions (vide p. 13 of this volume).

The applicant had sold his son's property, and sought to obtain authority to transfer to the purchaser. The land stood vested in the father as trustee for his minor son, and there was no authority for the proposed alienation.

The Court was moved to authorise transfer upon payment to the Master of the original cost of the land, and the proceeds of another lot, sold by authority of the Court on condition that the price were spent in improving the property new sought to be dealt with. No order was, however, made, and the application was withdrawn.

Greene now offered to pay to the Master, on behalf of the minor, the whole of the proceeds of sale.

Per curian: Upon payment to the Master of the whole of the purchase price of the property, for investment on behalf of the minor in the usual manner, the Registrar of Deeds authorised to pass transfer to the purchaser.

[Applicants' Attorneys: Anderson & Watt, Newcastle.]

July 38,

In re The Intestate Estate of Mary Charlotte Rawlinson.

In re Rawlinson,

Executor. Intestate Estate. Proof of debt.

Confirmation of executor dative's account withheld by the Court, it appearing that a claim by deceased's husband, absorbing all the assets of the estate, had been insufficiently proved.

(In banco).

The accounts filed by the executor dative in this estate showed as assets a piece of land purchased from the Crown, with nine of the ten annual instalments paid thereon, and some cattle. A sum in excess of the proceeds at public auction of this property was claimed by the deceased's husband, in respect of the instalments on the land paid by him, survey fees, funeral expenses, and a share of the cattle. The only voucher for this claim was a receipt for the amount as claimed paid over by the executor. The parties had been married under ante-nuptial contract excluding community. There were five minor children.

The account had been submitted to Wracc, J., in Chambers, on the 14th July. His Lordship, considering that the executor had before him utterly insufficient evidence on which to pay over all the assets to the husband, directed the application to be brought before the full Court.

Tainton, for applicant.

GALLWEY, C.J.: Surely you cannot ask us to confirm the account on such proof? Let sufficient proof of the claim be produced.

Application withdrawn.

[Applicant's Attorney: J. W. TAINTON.]

... In to The Insolvent Botate of Groups Davies.



ាល ១០០ ឡើយលេខភាពការសារការស្នំ**មានស៊** Involvency. Objections to election of trustee. Confirmation: In re Duries Practice. Sec. 44 of Insolvency Law.

When objections have been taken to the election of a trustee, it is necessary that they should be brought before the full Court. Should the objectors not appear, the Muster will submit the papers to the Coart.

(In banco).

At and after the first meeting of creditors in this estate, held at Vertilant before the Magistrate, objections were taken to the election of a person proposed as trustee, on the grounds of insufficient authority to vote, animus against the insolvent, and having solicited votes. The Macter having submitted the election, with the objections. to Gallwey, C.J., in Chambers, Mis Lordship directed that the matter should be brought before the full Court, as required by sec. 44 of the Inservency Law. No one appearing on behalf of the objectors, the Master and Registrar submitted the papers to the Court.

Per curiam: The election confirmed.

CONRAD BERNARD COOKE (Plaintiff) v. Peter Davis, trading as P. Davis & Sons (Defendant).

New Trial. Judge's direction. Shorthand notes. Practice. Cooks v. Davis

At the hearing of an application for a new trial, counsel desired to read and to found his application upon a transcript of the shorthand notes of the Judge's direction taken at the trial by a writer employed for that purpose. HELD: That in order to make use of the noter so trunscribed the transcript should, before being filed, be submitted to the presiding Judge, for revision.

(In banco).

Laughton, for plaintiff, in moving for a new trial of this course which had been tried in March term before Transwitt. J., and a common jury, asked to be allowed to use a ***** script of the learned Judge's summing up. A short-hand writer had been employed by pleintiff atterney to take notes of the summing up, and he now swore to the accuracy of the transcript dought to be most. A first with

1808. July 1, 23, 25, and 26.

TURNBULL, J., considered that the transcript should not be used, as though generally fair and accurate, it was by no means a *verbatim* report, and His Lordship had not seen it before the application for a new trial.

The Court allowed Mr. Laughton to read and argue upon

the transcript.

GALLWEY, C.J., and WRAGG, J., however, intimated that the proper course, in such cases, was to submit the transcript to the presiding Judge, before being filed, for his revision.

[Plaintiff's Attorneys: LAUGHTON & TATHAM. Defendants' Attorney: R. F. Morcom.]

1892. July **26**. MATTERSON BROTHERS (Plaintiffs) v. ALFRED DAVID THOMAS (Defendant).

Matterson Bros. v. Thomse.

Civil Imprisonment. Execution for costs. Pending application for new trial.

The Court will not make an order for the imprisonment of a defendant in respect of judgment in an action for a new trial of which an application is pending in the Court.

(In banco).

This was a summons to show cause why the defendant should not be imprisoned by reason of his failure to satisfy the writ issued in the matter of A. D. Thomas v. Matterson Bros. in which judgment had been given for the defendants with costs.

An application for new trial of the cause had been heard on the 11th and 12th instant, judgment being reserved and still pending.

Greene, for plaintiff.

GALLWEY, C.J.: How can we imprison a defendant pending an appeal? We will postpone any decision until judgment has been given upon the application for a new trial.

Per curiam: Order accordingly.

[Plaintiffs' Attorneys: Bale & Gerene.]

MICHAEL HUBLEY O'DONNELL (Appellant) v. Donald STEACHAN (Respondent).

July 26 & 27.

O'Donnell v. Stracken.

Review. Magistrate's judgment founded on law not applicable to the case. Remittal. Costs.

Where it appeared to the Court at the hearing of a review that the Magistrate had decided the case under statute law not applicable thereto, the case remitted to the Magistrate for rehearing, with a direction as to the law rightly applicable.

(In banco).

This was a review of the judgment of the Magistrate of Alfred County, in favour of the plaintiff, in an action for the value of certain cattle which it was claimed had died from lung-sickness after having been purchased by plaintiff from defendant.

The Magistrate regarded the case as governed by Law

9, 1871 (Lung-sickness).

The defendant appealed, on several grounds, that material to this report being that Law 9, 1871, was not applicable to a contract of purchase and sale entered into and implemented in Griqualand East, beyond the border of this Colony.

Gallwey, for appellant.

Coldridge, for respondent.

Per curiam: The case remitted to the Magistrate for rehearing, with a declaration—(1) That the Law 9, 1871, is not applicable to the case; (2) That the lex loci contractus governs the case. Costs of the Court below to be costs in the cause. Costs of this review granted to the appellant.

[Appellant's Attorney: W. J. GALLWEY. Respondent's Attorneys: Boshoff & Coldridge.]

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The Mata Rank (Le.) (Appolients) a liman Canus (Respondent).

Banker. Lost halves of Bank Notes. Indomnity. Sec. 60 of Bills of Exchange Law, 1886. Practice—costs.

Sec. 69 of the Bitts of Rechange Law, 1886, enacts that "In any action or proceeding upon a Bitt, the Court or a Judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or Judge against the claims of any other person upon the instrument in question."

HELD: That this provision, in effect, embodied the civil law, as administered in Courts of Equity, and was applicable to an action by the holder of certain halves of bank notes, for recovery from the bank of the amount of the notes, the other halves having been lost.

MALD, further: That the indemnity referred to in the 69th sec, was an indemnity given before action brought.

HELD, further, upon review of a Magistrate's judgment, in favour of the holders of the halves, such judgment being on the ground that, as the Bank was not interested to chim any indemnity, an indemnity tendered but not accepted, and not in terms of the 69th section, was sufficient—That the Magistrate's judgment should be corrected, so as to order plaintiff to give the indemnity required by sec. 69, to the satisfaction of the Master; and that, upon such indemnity being given, judgment be pronounced for the plaintiff (respondent in review) for the amount of the nates.

Costs of review and those of the Magistrate's Court action ordered to be paid by the plaintiff.

(In banco).

This was a review of the judgment of the Magistrate of the City Division of Pietermaritzburg, in favour of the respondent.—plaintiff in the Coart below—who sued the defendant hank for the amount of certain seven 45 notes, the halves of which had been lost in their transmission through the post. The plaintiff tendered an indepanity (not, however, in terms of sec. 69 above cited), but the bank did not consider it sufficient.



The Magistrate, in finding for the plaintiff for the amount claimed, ordered that the offered indemnity should be given. The bank appealed.

In his reasons for judgment, the Magistrate relied chiefly on Redmayne and another v. Burton, Lloyd, & Co. (2 L.T., N.S., 324, referred to in 9 Jur. Pt. 2, N.S., 21), as showing that the bank would be liable to pay without an indemnity, and that as there could be no claim by any other person upon the half-note, it not being a negotiable instrument, the provisions of the 69th section, cited above, did not apply. As, however, an indemnity had been offered, and was regarded by the Court as sufficient, the Magistrate approved of the indemnity and ordered it to be given to the hank.

The grounds of review were based upon these reasons, and, in particular, averred that an indemnity should have been given, in terms of the 69th sec., to the Magistrate's satisfaction, prior to the entertaining of the action.

Morcom, A.G., for the appellant bank: The Magistrate was wrong in holding that the 69th section of the Bills of Exchange Law, 1886, was not applicable to the case. That section is the same as sec. 70 of the English Act 45 and 46 Vic. c. 61, the latter having been adapted, with modifications, from sec. 87 of the English Common Law Procedure Act. 1854. The action on a lost instrument cannot be brought until an indemnity has been given-not merely offered (The Conflans Stone Quarry Co. (Ld.) v. Parker, 3 C.P.1; Chalmers on the Bill of Exchange Act, (2nd Ed.) Notes on sec. 70, at p. 217). A bank-note is subject to the law as to promissory notes (sec. 88, B. E. Law, 1886; sees. 35-87, Law 43, 1888). Each helf of the note is a negotiable instrument, and the first presenter is entitled to payment on giving indemnity (Mayor v. Johnson, 3 Camp. Rep., 324). Bules on Bills, 14th Ed., 398, shows that it is the practice of the Renk of England to pay helfnotes on indemnity given (King and others v. Limmonsan and others, 6 C.P., 466; Gnart on Banking, 356). The recurity tendened included partners, and was insufficient (Bustiel v. Williams, 4 Excha., 638; Small v. Smith, 10 App. Cas., 119).

July 27 & 28. Natal Bank v. Ismail Cassim

Laughton, for respondent: Only part of an "instrument" has been lost; the remaining half is not "negotiable," and therefore the 69th section of the Bills of Exchange Law, 1886, does not apply. If, however, that section is applicable, it does not require indemnity to be given before action. That is merely a point of English practice, under which a summons is required, for which there is no machinery here. As to the rights of a holder of half-notes, there are none until the two halves have been joined together (1 Fisher's Dig., 599, citing Smith v. Mundy, 3 Ellis & Ellis, 22, and 29 L.J., Q.B., 172; Grant on Banking, pp. 357, 358 and note, citing Redmayne and another v. Burton, Lloyd & Co. (vide supra), [GALLWEY, C.J.: That was merely an obiter dictum of Mr. Justice Willes,] Archbold's Practice, Q.B., 1146, citing King and others v. Zimmerman and others (vide supra). The practice of this Court is shown in Jee's Executors v. Stanley (13 N.L.R., 99). Indemnity may be tendered at the trial. The security offered was sufficient. [He also cited Story on P.N.'s, secs. 189, 445, 446, 451; Byles on Bills, 378-380; Ex parte Greenway, 2 Camp., 214; Hansard v. Robinson, 7 B. & C., 90; Mossop v. Eadon, 16 Vesey Jun., 430.]

Morcom, A.G., in reply, cited Noble v. Bank of England, 33 L.J., Exchq., 81.

(Cur. adv. vult.)

Postea: 28th July, 1892. (In banco).

GALLWEY, C.J.: Before the Court adjourned yesterday, we were prepared to deliver judgment, but I thought, in the interests of justice, that it might be well to ascertain the tenor of the Roman-Dutch Law as to lost documents. I am glad to say that our search has been successful, as showing that the doctrine of the Civil Law, upon which equity jurisprudence is based, is almost identical with the provisions of section 69 of the Bills of Exchange Law, 1886. "The French Law," as Story says (*Prom. Notes*, sec. 447), "adopts precisely the same rule, which is followed in Courts of Equity; and there is great reason to suppose that it constitutes the basis of the general law of the commercial nations of Continental Europe."

In my opinion, therefore, in the action now brought in review, there was not a compliance with the Law. I yesterday referred to the terms of the indemnity bond put in, which are not those which the law requires. The judgment

of the Magistrate must be set aside.

WRAGG, J.: I am of opinion that the 69th section of our Law, No. 8 of 1887, does apply to this case, and that the construction to be placed upon that section is that for which Natal Bank v. the learned Attorney-General has contended. Had the action been brought in this Court, the defendant could have pleaded the loss of the instrument, and that plea could not have been defeated except by an exception that the plaintiff had in fact given an indemnity to the satisfaction of the Court or a Judge thereof. The judgment of the Resident Magistrate was, clearly, irregular. I do not, however, think that, as matters stand, the case should be remitted to the Magistrate: such an order would cause undesirable expense, which we can save by an order that the plaintiff do give an indemnity to the satisfaction of our Master, and that thereupon judgment be recorded for the plaintiff for the amount claimed.

Ismail Cassim

As, in my opinion, the procedure adopted by the plaintiff was wrong, he ought to pay the defendant's costs of this appeal and in the Court below.

TURNBULL, J.: I am of opinion that, prior to the passing of Law 8, 1887, our Supreme Court, being a Court of Law as well as of Equity, could have dealt with this case under the common law of the land. As, however, the legislature has stepped in, with the view of assimilating our law to that of the United Kingdom, with regard to Bills of Exchange, Promissory Notes, &c. (see preamble, Law 8, 1887), we have to take cognizance of the 69th section of Law 8, 1887, in any action or proceeding upon a lost note or lost half-note, and that section has to be read together with secs. 1 and 88 of the same Law, and with Law 43, 1888, secs. 35-37, to obtain its true construction with reference to lost notes.

This 69th section of Law 8, 1887, corresponds almost verbatim with sec. 87 of the English Common Law Procedure Act, 1854, and but for this I should be inclined to take Mr. Laughton's view that the words "be given" in sec. 69, referring to the indemnity, could not be taken to mean "having first been given." But having brought ourselves under the English Law, it follows that we must be governed by the procedure under that Law; and, after considering the authorities cited, I have come to the conclusion that the contention that the lost half of a bank-note is not a lost instrument cannot be maintained. One-half is to all intents and purposes lost, seeing that its whereabouts is not known, and it is of no use to the person in possession of the other half. But, as to the missing half

Faly 27 & 26. Natus Binck v. Senati Canada inving no value, it is to be gathered from Lord Ellen-borough's judgment in Mayor v. Johnson (vide supra) that both halves have a value—the half that is known to exist, and also the other half, which may be in the possession of a bone fide holder for value. I am also guided by the case of King and others v. Zimmerman and others (vide supra), and my epimion, in the light of that authority, is that the Magistrate was wrong in holding that the 60th section of our Bills of Exchange Law did not apply. That section is as much applicable to the case as was sec. 87 of the Common Law Procedure Act to the cases decided in England; and, following these decisions, I am inclined to say that costs should be paid by the plaintiff up to date, and that upon a proper indemnity being given, with security to the satisfaction of the Master, the plaintiff should be allowed to proceed with his action.

GALLWRY, C.J.: I desire to add that the modern as well as the old French law relieves an acceptor from the obligation of paying a lost bill, unless security be given to the satisfaction of the Court.

Per curiam: The respondent ordered to give an indemnity, to the satisfaction of the Master, against the claims of any other person upon the appellent bank in respect of the bank-notes in question. Upon such indemnity being given, judgment for the respondent (plaintiff in the Court below) for £35. The respondent to pay the costs of the action in the Court below and of this review.

[Appellant's Attorney: R. F. Morcon. Respondent's Attorneys: LAUGHTON & TATHAM.] In re THE INSOLVENT ESTATE OF RICHARD DANGER DICKER.



Insolvency. Compulsory sequestration. Proof of debt due to petitioning creditor.

At the hearing of a summons to show cause, upon a creditor's petition, further proof of debt due to the petitioning creditor, ordered by the Court to be adduced.

(In banco).

Mason moved for an order of final sequestration against the above-named insolvent, upon the petition of W. G. Brown & Co., which averred that the debtor, some time in the petitioners' service, was indebted to them in the sum of £471 6s. 3d., being money appropriated from them while in such service.

The debtor had committed an act of insolvency, by presenting a petition for the sequestration of his estate. He had been convicted of the theft of several sums of money from the petitioners (not, however, to the amount mentioned in the petition) and was now in prison.

GALLWEY, C.J., referred to Dunn & Co. v. Treu (12 N.L.R., 61), and intimated that further proof was necessary in respect of the debt due to the petitioners.

Postea, on the same day, before WRAGG, J., in Chambers.

Upon further proof, supported by statements of account and affidavit, an order was made for the sequestration of the debtor's estate.

[Plaintiffs' Attorneys: HATHORN & MASON.]



May 2, July 29, PHILIP STRIDE (Plaintiff) v. THE COLONIAL GOVERNMENT (Defendant).

Stride v. Colonial Govt.

Railway. Suspension and dismissal of Railway Official.

Decision of Governor in Council. Appeal. Law 9,
1882, sec. 5.

A railway official, having been suspended and dismissed from his employment by the General Manager, appealed to the Governor in Council, who confirmed the suspension and dismissal (Law 9, 1882, sec. 5). Held: That such suspension and dismissal were not subject to appeal in the Courts of Law of this Colony, and that, therefore, the employé so dealt with could not sustain an action for wrongful dismissal. Held, further, that the omission of the plaintiff to bring forward all the facts in support of his appeal to the Governor in Council was not such a grievance as would justify the interference of the Court. (Henwood v. Trafford and others, 11 N.L.R., 93, followed).

This was an action for recovery of £261, as damages for the wrongful dismissal of the plaintiff, a railway official, from the service of the Natal Government Railways, and for salary short paid.

The defendant pleaded, inter alia, that the dismissal, having been confirmed by the Governor in Council, was

final and without further appeal.

In his replication, the plaintiff admitted the decision of the Governor in Council, but averred that it had been come to without opportunity being afforded to plaintiff of putting all the facts forward, and did not disentitle him to the

relief sought.

The action was decided upon exceptions to the replication, the material averment being that the decision of the Governor in Council, confirming the suspension and dismissal, was not subject to appeal to the Courts of Law in this Colony, and that the acts, matters, and things complained of did not give rise to any right of action on the part of the plaintiff in reference thereto.

The facts will be more fully gathered from the judgment

afterwards delivered.

Morcom, A.G., in support of the exceptions: Plaintiff was a "railway official," and has therefore no appeal from the decision of the Governor in Council, which is "final and conclusive," though sought to be brought under review Colonial Govt. by this action. [He cited Meller's case (not reported—No. 1,607, Illiquid Roll, 11 Jan., 1879); Allison v. Colonial Government (8 N.L.R. (July) 28, and No. 2,072, Illiquid Roll, 1892) Roll, 1882); The "Verandah" case (13 App. Cases, 478 and 5 N.L.R., 74 and 246); Mackenzie v. Chadwick, 6 N.L.R., 252; Henwood v. Trafford and others, 11 N.L.R., 93; Qiqa v. Dhlangane, 12 N.L.R., 291.]

Escombe, for plaintiff: The petition to the Governor in Council was not an appeal under Law 9, 1882, sec. 5. The words "without appeal," may mean "without appeal to the Secretary of State." If the legislature meant to restrict the rights of a subject to the extent claimed by the defendants, it would have done so in clear and unmistakeable language. [He cited Elliott v. Royal Exchange Assurance Co. (2 Exch., 237).]

Morcom, A.G., in reply, cited Allbutt v. General Council of Medical Education and Registration (23 Q.B.D., 400).

(Cur. adv. vult.)

Postea: July 29. (In banco).

The following judgment was delivered:—

GALLWEY, C.J.: The argument in this case rose upon demurrer to the 1st and 4th paragraphs of the replication. The action was brought against the Colonial Government, or Natal Government Railway, for the wrongful dismissal,

by the General Manager, of the plaintiff from his employment as foreman blacksmith on the Natal Government

Railways.

The plaintiff was engaged in London by the Crown Agents, in August, 1889, to serve the Government of Natal as blacksmith on the Railway in Natal, for three years from his departure from England. While so serving in his employment, the plaintiff was promoted to be foreman blacksmith, on the 20th June, 1890, and served in that employment on the Natal Government Railway, and while so employed, the plaintiff complained that he was wrongfully dismissed on the 28th December, 1891, by the defendant, who was then the General Manager of the Natal Government Railways.



The defendant, as General Manager, on sufficient cause to him appearing, suspended, on the 5th of November, 1891, the plaintiff from the performance of his duties, and, on the 28th of December, dismissed the plaintiff, on the

grounds of absence from duty without leave.

The plaintiff, on the 7th January, 1892, exercised his right of appeal to the Governor in Council. On the 15th day of January, 1892, the Governor in Council confirmed the said suspension and dismissal, and it is relied on that said dismissal is final and without appeal to the Courts of Law in this Colony.

The plaintiff replies that he had submitted to the General Manager reasonable and sufficient grounds for such absence.

Plaintiff admits that he prayed the Governor in Council that he might be entitled to the benefit contained in his letter of promotion, and that his suspension might be cancelled, and admits that it was decided by the Governor in Council without opportunity being afforded of putting all the facts forward, and he denies that his said prayer to the Governor in Council, or any conclusion come to by the Governor in Council, disentitles him to the relief sought by him,

The replication is demurred to as being bad in law, on the ground that the decision of the Governor in Council, confirming the suspension and dismissal of the plaintiff by the General Manager of Railways, is not subject to appeal in the Courts of Law in this Colony, and that the acts, matters, and things alleged do not give any right of action

on the part of the plaintiff in reference thereto.

The main question here raised on this demurrer—Does the Law 9, 1882, give the General Manager this power of dismissing the plaintiff exercised in this case, and, if such dismissal is confirmed by the Governor in Council, the official so dismissed can sustain an action in this Court alleging wrongful dismissal. The Railway Law has not been relied upon. In Lance v. Corporation (12 N.L.R., 96) this Court held that plaintiff is not bound to plead the Statute, the facts relied upon in the pleadings bring the parties within the operation of the Statute.

The Railway Law 9, 1882, was in force when the plaintiff engaged to serve the Government of Natal on the Railway,

and is still in force.

The plaintiff was a Railway Official in terms of the 32nd section of that Law, and as a Railway Official came within the province and operation of the 5th section of that Law. The plaintiff was suspended and dismissed under the provisions of the 5th section. He appealed to the Governor in Council. The suspension was confirmed. The Railway

Law makes provision that no Railway Official shall be considered or included among the civil servants employed on the permanent civil service of the Colony. The Railway Stride v. Officials were thereby excluded from the operation of the Colonial Govt. provisions made under Colonial Office Rules and Regulations in the suspension and dismissal of permanent civil servants. The Railway Law therefore provided a tribunal, conferring on that tribunal the power of suspending and dismissing Railway Officials for misconduct; and empowered the General Manager, on sufficient cause to him appearing, to dismiss a Railway Official for misconduct, with a right to appeal to another tribunal also expressly empowered to entertain any appeal by a Railway Official against his suspension or dismissal by the General Manager,

without further appeal. This Court has determined a similar question in Henwood v. Trafford (11 N.L.R., 93). That was an action for trespass on plaintiff's farm. Defendant pleaded the finding of a Road Board confirmed by the Governor, that the locus in quo of the trespass was on a public road. The Local Board was elected under Law 17, 1883, and was empowered to take into consideration all cases of dispute as to rights of way and to decide all such questions referred to them. A certified copy of the proceedings of the Board was required to be forwarded to the Governor for confirmation, and in the event of the Governor confirming the decision arrived at by the Board, the Board gave notice to the parties. The Board gave their decision and it was confirmed by the Governor. The jury returned a verdict in favour of the plaintiff.

Defendant applied for a new trial or judgment in their favour on several grounds. The main ground that it was not competent for a jury to decide as to the validity of a decision of the Road Board confirmed by the Governor.

The Chief Justice, in giving judgment, is reported to have said, "I think the jury should have been directed "that the decision of the Road Board confirmed by the "Governor was to be taken as binding on the plaintiff. "do not go into any question as to neglect of formalities, "to do so would be to review the decision confirmed, and "that I do not consider I have jurisdiction to do."

The Supreme Court acted on the judgment given in MacKenzie's case (6 N.L.R., 252), that the placing of the decision of the Road Board under the Governor's confirmation took away from the Supreme Court the power to overrule it, as the decision of an inferior court, because not only was it not the decision of an inferior court, but also that of the Governor, the representative of the Queen.

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It may be noted that there was a serious informality in the proceedings of the Board. The applicant had not

received notice of the proceedings.

I refer to the authority of the Courts to enquire into the proceedings of Boards empowered by Law to enquire into the conduct of members of a profession and to interfere with that decision, La Mert's case (33 L.J. Q.B.) Court was moved for a rule calling on the General Council of Medical Education to show cause why a mandamus should not issue commanding them to restore his name to the medical register, from which it had been removed by the Council under 21 and 22 Victoria C. 90, sec. 29. section is: "If any resident medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offence, or shall, after due inquiry, be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

C. J. Cockburn delivered judgment as follows: "We are all agreed that 21 and 22 Victoria C 90, sec. 29 makes the Medical Council sole judges of whether a medical practitioner has been guilty of infamous conduct in a professional respect, and that this Court has no more power to review their decision than they would have in the present mode of proceeding, of determining whether the facts had justified a conviction for felony under the first branch of the

section."

"The Council have found the applicant guilty after due enquiry, and whether the facts justified the finding or not, the Council is the tribunal to whom the legislature has left the decision, as being the best judges in the matter, and this Court cannot interfere." Allbutt's case (23 Q.B.D., 401) was an action brought against the same defendants and tried before a jury. The plaintiff claimed a mandamus to restore his name, removed under the same Law by the said Council, and claimed damages for the removal of his The Court of Appeal confirmed the decision of the Court at Nisi Prins and adopted the judgment in La Mert's case (vide supra). It was urged that the question of due inquiry ought to have been left to the jury. The Appeal Court held that there was no evidence of any absence of due enquiry to be left to the jury.

Demurrers were in 1883 abolished in England, and in lieu of demurrer, the order provides that any party shall be entitled to raise by his pleading any point of law which amongst other means the judge may dispose of at the trial.

I mention this to show that this question is now in England raised at the trial, but demurrer still prevails here and the question may be decided on demurrer.

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This doctrine was declared by the Privy Council to be the practice of that Court. In Robertson's case (11 Moore's Privy Council Cases, 296). That officer held an appointment created under an act of the Colonial Legislature of New South Wales. The Privy Council held that his office was not comprised in the terms of the Statute 22, George III., and therefore the dismissal was not an appealable grievance under that statute, and in reply to the question, whether the dismissal by the Governor in Council was an appealable grievance by itself, they enunciated the following doctrine: "Courts of Law do not enter into the consideration of such acts as are done by the Governor and Council of a Colony, in the exercise of the power committed to them, whereby they dismiss persons from holding situations in the Colony, and upon that ground they decided that the petition cannot be sustained."

It seems to me there is no legal distinction between the cases of officers dismissed by the Governor in Council under the powers conferred on him by his commission, or under the authority of the Statute, George III., or under the Railway Law, when the Governor in Council confirms the dismissal by the General Manager.

In Robertson's case (vide supra) the Court stated: "But their Lordship's cannot help thinking that Robertson, though he may have reason to complain of the ultimate judgment, can have no reason to complain that he has not been heard. It is impossible to put forward that ground in the case as a grievance, for instead of being dismissed without a hearing, he had an opportunity of justifying himself, if in the judgment of the Governor and Council he could do so."

Apply that doctrine to the facts of the present case. Here, the plaintiff appealed to the Governor in Council, and prepared his petition of appeal. He does not state that he asked for a rehearing, or offered other facts beyond those stated in his appeal for reconsideration, and that he was refused. I consider that the statement in the replication as to his dismissal by the Governor in Council without opportunity of putting all the facts forward is not a ground of grievance.

Upon the authority of the Court in Henwood's case (vide supra) that the Court has no power to inquire into inform-

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alities occurring in a case of a finding of a Board when confirmed by the Governor—or in Robertson's case (vide supra)—the omission by the plaintiff to bring forward all his facts in his appeal to the Governor in Council, is not such a grievance as would justify the interference of this Court.

The 2nd. Exception—the one to the fourth paragraph of the replication—will be sustained.

As regards the first exception. It seems to me that it assumes the form of a plea—relying on facts required to be proved, and referring to an agreement, declared by the defendant to be a valid agreement. Each party will have to bear its own costs.

These exceptions do not dispose of the claim for £5 short paid.

WRAGG, J.: I have come to the same conclusion. I am of opinion that the decision of the Governor in Council in this matter is final and not subject to review, and that it does not give rise to any right of action in this Court.

TURNBULL, J.: I have had the advantage of perusing the judgment of His Lordship the Chief Justice, with which I entirely concur.

Per curiam: Judgment for plaintiff, for £5, without costs.

[Plaintiff's Attorney: HARRY ESCOMBE. Defendants' Attorney: J. P. WALLER.]

In re C. Stephens and others.

1892. July 26. August 3.

Bail. Magistrate's discretion. Powers of Supreme Court. In re Stephens

Application for an order, fixing amount of bail and directing release of prisoners on bail being given, refused by the Court (WRAGG, J., dissentiente) in a case where persons charged with conspiracy had been remanded to prison by a Resident Magistrate. [Upon subsequent application, however, the preliminary examination being protracted, the application granted.]

(In banco).

Hathorn, for applicants, six Indians, moved for an order as above, and urged that although the Magistrate had refused bail, in his discretion under sec. 42, Ord. 18, 1845, sec. 62 of that Ordinance gave the Supreme Court full power to give relief where a prisoner felt aggrieved.

WRAGG, J., was of opinion that the Magistrate had wrongly exercised his discretion, which was a subject for review by the Supreme Court.

GALLWEY, C.J., referred to the peculiar nature of the offence charged, that of conspiracy, and thought that the Magistrate's discretion should not be interfered with.

TURNBULL, J., considered that, notwithstanding sec. 42, the subsequent sec. 62 of the Ordinance empowered the Court to make the order asked for, but was opposed to interfering at the present stage.

Per curiam (WRAGG, J., dissentiente): The application refused.

Postea: August 3rd, 1892. (In banco).

Hathorn renewed the application. The prisoners were still in gaol and the preliminary examination had been protracted and was not yet concluded.

Morcom, A.G., in reply to the Court, stated that he had no objection to bail being allowed, and had advised the Magistrate to that effect.



Per curiam: Bail fixed at £100 each, in personal bond. Upon finding such bail, the applicants ordered to be released from custody.

[Applicants' Attorneys: DILLON & LABISTOUR.]

1892. August 16. ALFRED THOMAS (Plaintiff) v. JOHN TAYLOR (Defendant).

Thomas v. Taylor. Provisional Sentence. Defence. Payment. Authority of Agent to receive debt. Costs.

Provisional judgment on a mortgage bond refused, it appearing that the interest, for the non-payment of which the action had been brought, had been paid, before summons issued, to an attorney, whose authority to receive the money on plaintiff's behalf, was, however, called in question.

There being, in the opinion of the Court, circumstances which might have led defendant to suppose that the attorney was duly authorised to receive payment, no order made as to costs.

(In camera before WRAGG, J.)

This was a provisional summons on a mortgage bond. The default alleged was non-payment of interest on the due date. It appeared that an instalment of interest fell due, without notice, on the 19th May, 30 days' grace being however, allowed in the bond. On the 9th July the plaintiff gave notice, in writing, to the defendant, to pay the interest to the writer on or before the 16th July. On the 13th July, the defendant paid the amount due to an atterney, who, it appeared, had on previous occasions, received from defendant the instalments of interest due under the bond. The attorney remitted the interest to plaintiff on the 20th July by post, but the letter, apparently, did not reach the plaintiff until the 33rd July. Meanwhile on the 20th July summons had been issued.

The question was really one as to the incidence of the costs.

Bule, for plaintiff, contended that the default as to payment of interest could not be cured by what happened afterwards. (McKenzie v. McDonnell, 5 N. L. R., 245): Any authority to the attorney was revoked by plaintiffs demand for the interest to be paid to him direct.

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Taylor.

Pitcher, for defendant: All instalments of interest were paid through the agent.

Wrace, J.: Were there not circumstances which might reasonably lead the defendant to suppose that he had to pay to the agent, through whom the loan had been negotiated? The plaintiff's letter must be regarded in the light of all the surrounding facts. Provisional judgment will be refused, but, under the peculiar circumstances, I will make no order as to costs.

Order accordingly.

[Plaintiff's Attorneys: Bale & Greene. Defendant's Attorney: W. E. PITCHER.]

In we The Insolvent Estate of George Davies.

1892. August 30. Sept. 14.

Insolvency—Removal of trustee. Jurisdiction—Judge in Chambers. Costs.

In re Davies.

An application, under sec. 57 of the Insolvency Law, for the removal of a trustee in insolvency, is not a matter proper to be decided by a Judge in Chambers.

Order as to costs of such an application wrongly made in Chambers.

(In camera). Before WRAGG, J.

Pitcher moved for an order removing the trustee of the above-named insolvent estate, on grounds set forth in affidavits by certain creditors.

August 30. Sept. 14. Hathorn, for the trustee, cited sec. 57 of the Insolvency Law, empowering "the Supreme Court or any Circuit Court" to remove a trustee on cause shown. He contended that the application could not be dealt with in Chambers.

Pitcher referred to Law 11, 1877, and argued that the schedule did not exclude the present application from the jurisdiction of a Judge in Chambers.

WRAGG, J.: How can you quote that against the express words of the 57th section of the Insolvency Law? The removal of a trustee is a serious matter, which the Law has left to the full Bench or to a Circuit Court. A Judge in Chambers is neither the Supreme Court nor a Circuit Court.

Hathorn asked that his client's costs only should be made costs in the cause, as the application had been wrongly made.

Order:—The application to be brought before the full Court. Respondent's costs to be costs in the cause.

[Applicant's Attorney: R. H. Christison, Verulam. Respondent's Attorneys: Hathorn & Mason.]

Note.—The matter came before the full Court on the 14th September, when Sir Walter Wragg's decision, as indicated in the 1st paragraph of the head-note, was affirmed.—Ed.

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(NEW SERIES) VOL. XIII., PART V.

SEPTEMBER, 1892.

CHINIAN (Appellant) v. THE RESIDENT MAGISTRATE OF DURBAN (Respondent).

1892. May 30. July 1. September 1.

Magistrate's Court. Contempt. Law 25, 1890, sec. 18. Chinian v. R.M., Durban Review.

The proviso at the end of sec. 18, Law 25, 1890, reserving the right of an accused person to be tried upon summons, refers to the offence of wilfully disobeying a lawful judgment or order of the Court, and not to the contempts of Court described in the earlier part of the section.

Held (Gallwey, C.J., dubitante): That the Supreme Court has power to review the proceedings of a Magistrate in dealing with a person charged with contempt of Court.

(In banco).

This was a review of the proceedings of the Magistrate of Durban, who had found the appellant guilty of contempt of Court and had passed a sentence of imprisonment.

It appeared that the appellant, while under trial for some offence, had "nudged" a witness under examination, and had also prompted the witness, and, though the Magistrate did not hear what was said, he saw the appellant's lips move, whereupon the witness immediately altered his reply.

The appellant admitted having "nudged" the witness, and he was tried summarily for contempt of Court and sentenced to seven days' hard labour.

May 30. July 1. September 1.

Chinian v. R.M., Durban In the writ of review, the material grounds were that the appellant had no opportunity of being tried upon summons nor of calling witnesses.

Hathorn, for appellant: The right to be tried upon summons extends to a person charged with any of the offences specified in sec. 18, Law 25, 1890. The offence charged did not amount to a contempt of Court. The admission made by the defendant was wrongly taken as a plea of guilty. Evidence should have been taken.

Morcom, A.G., for respondent: A summons is only contemplated by sec. 18 in the case of an act not done in the face of the Court. That section provides two distinct modes of procedure, the proviso as to a summons being applicable only to the offence of wilfully disobeying an order of the Court. It is the practice not to interfere with proceedings such as these unless they have been outrageous (McDermott's case, 4 M.P.C., N.S., 110, and 5 M.P.C., N.S., 466).

Per curiam: To be referred to the Magistrate for an explanation as to the nature of the contemptuous act alleged.

Postea: 1st September, 1892: (In banco).

Counsel as before.

GALLWEY, C.J.: The Court upholds the Magistrate's decision, but I am not to be taken as concluding that this Court has power to review the proceedings of a Magistrate in dealing with a contempt of his court, when the prisoner is sentenced to imprisonment.

Wrage, J.: I think that the 18th section of Law 25, 1890, refers to two classes of offences, those in the former part being offences committed in the face of the Magistrate's Court, and those in the latter portion being such as are committed, not in the precincts of the Court, when lawful judgments or orders of the Court are wilfully disobeyed. As to the latter, the offender would naturally expect, and the section does actually confer, the right to be tried upon summons duly served. But as to the offences in the face of the Court, I am strongly of opinion that, when the Magistrate himself witnesses one of such open contempts, he can order the offender to be kept in custody until the rising of the Court, and can then summarily commit the offender to prison, without taking evidence—of course

asking such offender what he has to say by way of explanation or extenuation. To my mind, it would be ridiculous to require the Magistrate to discard the evidence of his own senses and to quest about for scraps of evidence from per- Chimian.v. sons present in Court when such contempt was committed.

September 1.

As to the question of review, I am certainly of opinion that this, the Supreme, Court has power of review in all such cases. The Magistrate may act hastily or harshly, and I should be very sorry to hold that his proceedings would not be subject to appeal to this, the highest, Court of the Colony.

TURNBULL, J.: I also am of opinion that the 18th section of Law 25, 1890, is divided into two parts—the former dealing with open contempts, which are triable summarily; the latter with the offence of disobeying a lawful order of the Court, which may be dealt with in a more formal manner. I also hold that, unless specially excepted, the Supreme Court has power to review any judicial act of a Magistrate (Law 10, 1857, sec. 27).

Per curiam: Application refused.

[Appellant's Attorney: E. W. FARMAN.]

JOHN HENRY WALLACE (Appellant) v. M. SACKVILLE WEST (Respondent).

September 1

Cattle-breeder. Rights of owner of Bull. Custom. Evi- West dence. Damages.

A custom prevailing among cattle-breeders in England is not applicable to Natal, unless proved to have been adopted in this Colony.

In the absence of evidence of any local custom to the contrary. or of any special contract, the owner of a stud bull cannot recover "subscription" or "booking" fees, in respect of cows sent for breeding purposes, where the bull had died during the breeding season and his services had in consequence not been given.

1892, September 1. Wallace v. West. West v. Under these circumstances, nominal damages given against the owner of the bull, in respect of his detention of cows (since returned) for non-payment of such fees. The loss of breeding season, and of the chances of calves, held, however, to be too remote.

(In banco).

This was a cross appeal from the judgment of the Acting Magistrate of Weenen County.

The parties were farmers and stock-breeders. The plaintiff in the Court below (Wallace) sued West for £10, as "subscription" or "booking" fees for two cows sent to plaintiff's stud bull. The agreement was a verbal one, and there was no evidence to show that defendant knew that he would have to pay for the "booking" of his cows, whether they had been served by the bull or not. The bull had died during the breeding season and before he had served the cows.

There was a reconventional claim by West for £42 10s., as damages for the plaintiff's detention of his cows and a calf.

The Magistrate found for the defendant, both in convention and reconvention. Both parties appealed.

In the writ of review, the appellant Wallace relied on evidence showing a special agreement, and also upon a custom prevailing in England and adopted by him.

The cross-appeal was chiefly on the ground that the Magistrate was wrong in not awarding general damages for the detention of the cattle.

Chadwick, for appellant, Wallace.

Carter, for respondent, West, was not called upon by the Court, but was heard for the appellant on the reconventional claim.

Chadwick, in reply.

GALLWEY, C.J.: This action is founded on a custom said to be known to both parties. Now, so far as I am concerned, no custom has been proved, and even if there were a valid claim on that ground, the evidence shows unmistakeably that at the time when the bull died the contract

had not been performed, and that, therefore, the defendant, West, was entitled to succeed. On these two grounds, I should uphold the Magistrate's decision in convention. Wallac With regard to the reconventional claim, I am not at all satisfied that the Magistrate came to a right conclusion. As the cattle have been returned, only nominal damages can be given. It is too much to ask the Court to give damages for a chance, such as the possibility of there being calves, or for the loss of a breeding season. I think that the sum of £2, with costs, will be sufficient.

1892. September 1. Wallace v. West. Wallace.

WRAGG, J.: The claim of the appellant, Wallace, is for "booking" or "subscription" fees, and, as I understand it, is based (1) on the existence of a custom in England and obtaining in this Colony, and (2) upon a special contract between him and West.

There is really no evidence to show that any such custom is generally prevalent in England or that it has been adopted in this Colony, and, as to a special contract, there is no proof that Wallace informed West, when the cows were sent, that the contract between them was of the nature of that set up by Wallace after the death of the bull. As to this point, the evidence is clearly in favour of West. Moreover, whatever may have been the contract, Wallace was not able to perform it, inasmuch as, before the season of six months had expired, his bull, to which West's cows were specially sent, died.

It appears to me, therefore, that the Magistrate was right in his judgment in convention; he was, however, wrong in the view he took of the claim in reconvention. There was clearly an illegal detention of West's cows, and, for that, nominal damages should have been awarded. Such damages I am disposed to assess at the sum of £2.

Mr. Wallace will have to bear the costs, both in this Court and in the Court below.

TURNBULL, J., referred to the evidence as showing that there was neither a special contract nor a custom applicable to the case, and concurred with the rest of the Court.

Per curiam: The Magistrate's judgment in convention sustained. Appellant to pay costs of appeal and those in the Court below. The Magistrate's judgment in reconvention corrected into a judgment for plaintiff for £2 with costs of appeal and those in the Court below.

[Attorney for J. H. Wallace: R. M. K. Chadwick, Estcourt. Attorney for M. S. West: J. J. Field, Ladysmith.]

1892. June 1, 2, 8. Aug. 1, 2, 3. Sept. 2. ORLANDO HOSKING (Plaintiff) v. THE STANDARD BANK OF SOUTH AFRICA (Ld.) (Defendant).

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- Banker. Alleged misrepresentation of customer's position.

 Liability of Bank for Manager's acts. Principal and surety. Communications between creditor and surety as to debtor's position.
- An action will lie against a bank, for damages in respect of a false and fraudulent representation as to credit made by the manager of the bank to a surety.
- In order to succeed in such an action, it must be shown that a false and fraudulent statement has been made, for the purpose of deceiving the person to whom it was made, with a view to its being acted upon, and that the person has acted upon it and has in consequence suffered damage.
- If a creditor be specially communicated with, he is bound to make a full and honest communication of every circumstance within his knowledge calculated to influence the discretion of the surety entering into the required obligation. But he is under no obligation to disclose, voluntarily and without being asked to do so, circumstances unconnected with the particular transaction in which the surety is about to engage, or to inform the surety of any matter affecting the general credit of the debtor. If the intended surety desire to know any particular matter of which the debtor may be informed, he must make it the subject of distinct enquiry.

(In banco).

This was an action for recovery of £2,200, as damages by reason of misrepresentation and concealment on the part of the Manager of the Standard Bank, Pietermaritzburg, in connection with the affairs of Edwin Woods, and for cancellation of a certain mortgage bond for £3,000, passed by the plaintiff in favour of the defendant bank.

The facts will appear in the judgment afterwards delivered. June 1, 2 and 3: (in banco), before Gallway, C.J., and Wrage, J. August 1, 2 and 3 (in banco).

June 1, 2, 3

Bule (with him Greene), for plaintiff, cited Pitcock and Hosking v. others v. Bishop, 5 Dow. and Ryland, 505; Wythes v. StandardBank Labouchere, 5 Jur., N.S., pt. 1, 499; North British Insurance Company v. Lloyd, 24 L.J., N.S., (Exchq.), 14; Evans v. Bremridge, 2 Jur., N.S., pt. 1, 134; Phillips v. Foxall, 7 Q.B.D., 666; Burge on Suretyship, pp. 1, 218, et seq.; Durrant v. Ecclesiastical Commissioners, 6 Q.B.D., 234; Beauchamp v. Winn, 6 H.L., 223; Haycraft v. Creasy, 2 East's Term Rep., 90; De Graves v. Smith, 2 Camp. Rep., 533; Stone and others v. Compton, 5 Bing. N.C., 142; Moens and others v. Heyworth and others, 10 M. and W., 147; Owen v. Gutch and Homan, 4 Clark's H.L. Cas., 997; Udell v. Atherton and another, 30 L.J., N.S., (Exchq.), 337; Lee and another v. Jones, 34 L.J., N.S., C.P. 131; Burke v. Rogerson, 12 Jur., N.S., pt. 1, 635; Barwick v. English Joint-Stock Bank, 2 Exchq., 259; Ramshire v. Bolton, 8 Eq., 294; Mackay v. Commercial Bank of New Brunswick and others, 5 P.C., 394; London and Provincial Marine Insurance Company v. Davies, 5 Chan., 775; Voet, 4.3 1 and 3; Kerr on Fraud, &c., 2nd Ed., pp. 92-95, 430; Low v. Bouverie, 3 Chan. Div., N.S. (1891), 82; Rhodes v. Bate, 1 Chan. App., 252; Smith and others v. Bank of Scotland, 1 Dow's Rep., 272; Prince and others v. Oriental Bank Corp., 3 App. Cas., N.S., 325; Grant on Bankers, p. 199, citing Garnett v. M'Kewan, 8 Exchq., 14; Marriott v. Hampton, 2 Smith's L.C. (8th Ed.), 421; Story's Eq. Jurisp. (3rd Ed.), vol. I., §§ 211 et seq., citing Dig., 18, 1, 43 and Martin v. Morgan, 1 Brod. and Bing., 289.

Escombe, for defendant, referred to the facts, and contended that there was no evidence to sustain the claim.

Bale, was heard as to the claim in reconvention.

(Cur. adv. vult.)

Postea: September 2nd: (in banco).

The following judgments were delivered:—

GALLWRY, C.J.: This action was instituted by the plaintiff, who was a broker, to recover from the Standard Bank the sum of £2,200 as damages sustained by him, by the Manager of the Standard Bank, P.M.Burg, inducing the plaintiff to endorse a promissory note made by Edwin June 1, 2, 8.
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Woods in favour of the plaintiff, dated 28th September, 1889, for the sum of £5,000 under the circumstances and for the purposes set forth in the declaration, and also for the cancellation of a mortgage bond for the sum of £3,000 passed by the plaintiff on the 12th day of December, 1890, in favour of the Standard Bank as security for the payment of the unpaid portion of said promissory note.

The declaration sets forth certain statements of fact which it is not necessary to allude to—further than relied upon in the arguments.

Edwin Woods was on the 27th day of September indebted for advances to the P.M.Burg branch of the Standard Bank in a sum of £4,500, and it was necessary for him to cover the amount of his indebtedness before the end of the month.

The declaration avers that the Bank intimated to Woods that the Bank would accept a promissory note at two months for the sum of £5,000 made by Woods in favour of plaintiff, and endorsed by him. Further, that Woods requested the plaintiff to do so, stating that he was in a solvent position. That the said debt was his only liability, that the note was required to square accounts at the end of the month.

The plaintiff thereupon waited on the Standard Bank, represented statements made by Woods, and informed the defendants that the transaction was entirely for the accommodation of Woods, and enquired whether the plaintiff would run any risk.

The defendant replied that Woods was most punctual in his payments, that plaintiff need have no hesitation in endorsing the note.

The plaintiff therefore endorsed the note.

The declaration further avers that Woods was on the 28th of September practically insolvent and unable to meet his liabilities, and indebted to the Estcourt Branch of the Standard Bank in £25,000. The said defendant did not nor did any of the servants of the bank disclose to plaintiff this indebtedness. The plaintiff was not aware of such liability.

The promissory note was not paid at maturity.

The plaintiff, upon request of Woods and Bank, renewed said promissory note for a period of two months, after enquiry made by plaintiff and assurance given by defendant that there was no alteration in the position of Woods, nor was there any disclosure by the defendant or the servants of the bank of Woods' indebtedness to the Estcourt branch. The defendant was aware at date of promissory note and of

renewal, of Woods' indebtedness to the Estcourt branch and the amount.

The plaintiff avers that he was induced to endorse the promissory note and renewal upon the assurance mentioned Hosking v. in the 12th and 21st paragraphs of the declaration. That StandardBank he was deceived by the defendant in not disclosing to him Woods' indebtedness to the Estcourt branch, thereby inducing him to endorse and renew the said note.

Subsequent to the failure of Woods, plaintiff paid £2,000 on account of said note, and passed in favour of defendant

the mortgage bond for £3,000.

The plaintiff then, in conclusion, avers that he endorsed said notes, paid said sum of money, and executed said mortgage bond in consequence of the deceit and misrepresentations of the said Bank, or in consequence of the negligence of the said Bank in not disclosing material facts, and in ignorance of the true facts.

The first question to be decided is, What was the true

position of the parties in this transaction?

Woods had in the month of August overdrawn his account, and to cover or square the monthly overdraft the Estcourt branch had transmitted to the P.M.Burg branch £2,000.

In September Woods, had overdrawn his account in P.M.Burg in the sum of £4,035, and he knew he had to cover that account before the end of the month. The plaintiff had an interview with defendant, at which interview Woods' financial position was discussed, and after that discussion the promissory note was made.

The plaintiff and defendant differ in their respective

versions of that interview.

The following extracts from the evidence of plaintiff and defendant disclose what each of them considers passed at that interview:-

PLAINTIFF'S EVIDENCE.—" I went there to ascertain Woods' position as he had asked me to back a bill to cover his

overdraft at Bank for £5,000.

"I think Mr. Woods was speaking to you about my backing a bill for £5,000 to cover overdraft; I have come across to make full enquiries. He tells me his overdraft is about £4,800, he expects about £200 more scrip to-day. Mr. Leigh, I want to be careful over this matter; it is purely an accommodation bill. Woods tells me he has about £8,000 bonds in his favour, that his property and scrip are also free. I want to buy a stock farm in a few days. I shall want all my money. I am not going to take the slightest risk. Defendant explained to me that Woods was an old customer of Bank, he had always been most

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punctual in all his payments, he was a first-rate man and that I need not have the slighest hesitation. Defendant asked me what security Mr. Woods proposed to put in in connection with the promissory note. I told him about £4,700.

"I said after the character you have given me I would be content to take a promissory note without any security whatever. He gave me a better character of Mr. Woods than of any other man I ever got. After this I went home and backed the bill. Defendant said, "to give you an idea of what the Bank thinks of Mr. Woods, we once lent him £20,000," I believe he said to lend to Wythes & Co. and Perry, "and Woods made out of that transaction £8,000." I thought Woods was a millionaire by the character I got of him.

"Woods told me before I went to Bank, he had come early to the office, he told me his account was overdrawn at Bank, that they wanted cover, he had suggested my name to Bank to back bills of his for £4,500, he said defendant

was agreeable."

DEFENDANT'S EVIDENCE.—"I believe plaintiff said Woods has been speaking to you about a bill. Will you discount his bill in my favour for £5,000 for two months? Scrip to the value will be attached to it. I told him I would. Plaintiff then said he supposed Woods was a good man for the bill, he would be all right. I said I had no doubt about it, I believed he would. I said he had dealt with the Bank for very many years, I never heard of his not being punctual, Plaintiff said Woods tells me he has got an overdraft at the Bank, I believe between £4,000 and £5,000. I looked at ledger, there was about £4,035, not quite the amount stated by plaintiff. When I returned plaintiff asked me if that was the case, I said I can't tell you about his account, we have found Woods thoroughly straightforward. If he chooses to tell you I think you can be satisfied. Plaintiff said this will do, that is enough for me."

Defendant denies that the statement of Woods' property being encumbered and his ownership of £8,000 of

mortgage bonds was mentioned at this interview.

PLAINTIFF'S EVIDENCE AS TO RENEWAL.—"I believe Woods was in town on 20th November. He told me share market had gone back, was very weak, it would be most suicidal to sell scrip then in a lump. He asked me to renew for other two months. I told him I could not say, I would go to Bank and see about matter. I saw Manager about 28th. I told Manager Woods had been speaking about renewing bill for a further two months. I asked him if Woods' position had in any way altered. He said not in the slightest degree as far as he knew. He said value of stocks had

fallen, and thought there should be some more security attached, seeing his position is not altered I don't wish to ask for further security. He asked me if I had not scrip of my own I could pledge. I said I saw no necessity for it. I had scrip I did not want to sell just then, I said it would be as broad as it was long as Woods' scrip then would be free for realization. I told him that Woods had said on 28th September that I could have security for £12,000 to £15,000 more scrip. I naturally thought that scrip was free. The bill was renewed (produced) 28th November, 1889. Woods in favour of plaintiff £5,000.

"I gave a cheque (Standard Bank produced) for £5,000 in favour of Standard Bank. I got up old note and handed same to Woods. I pledged scrip value £1,000 as further

security on the renewal."

To clear up or reconcile these different statements concerning words spoken some years ago, Courts looks naturally to correspondence and other evidence which clearly attends a transaction of the kind, which precedes it, accompanies it, or follows it, and which when it bears upon it the aspect of sincerity will always receive the greatest attention, and there is a mass of correspondence throwing some light on this dispute.

After the dishonour of the renewal note on the 20th February, 1890, the plaintiff gives the following version of the transaction in a letter to Woods dated 25th February, 1890. This letter is of such considerable importance to the

differences of opinion that I refer to it at length.

"At your request, I, as a temporary convenience, endorsed your P/Note for £5,000 entirely without pecuniary consideration to myself, fully understanding from you that you were in a thoroughly satisfactory financial position, you at the time pointing to the large quantity of scrip in your safe, and which you intimated was then, and would be available, as additional security if required. On the maturity of the P/Note, I, at your request, endorsed a renewal in the same manner and, moreover, by request of the Manager of the Standard Bank, I deposited my own scrip to the value of about £1,000 with the Bank as additional security for your note on the undertaking that the scrip in your safe was to be kept free for realisation if required. To my unutterable surprise when the P/Note came to maturity I discovered that you had lodged the whole of your scrip above referred to with the Bank, not as security for your P/Note in my favour but for other of your liabilities of which I was in total ignorance.

"You were perfectly aware that to place myself financially on the edge of a precipice was the farthest from my

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"After writing in vain for you to move to relieve me as you led me to suppose you would, I made endeavours to release myself, i.e., I approached the bank. The Manager informed me he would accept a fresh bill if I deposited the Title Deeds of my landed property as additional security, while at the same time he declined to allow the release of my £1,000 worth of scrip.

"I need hardly say that I could not consent to such an arrangement and I allowed the matter to rest in the hope

that you would yet move.

"I then received a note from the Manager of the Standard Bank reminding me of the P/Note and stating that he had heard nothing from me for a week or so. On my waiting upon him he asked me whether I could pay £500 or £1,000 on account of the note."

The plaintiff gets the note drawn by Woods for £5,000 dated 28th September, in his favour, endorsed the same, and handed the note to the defendant who gave it to the Bank Clerk for discount. The Bill was discounted, the proceeds placed to plaintiff's credit, and he paid the discount for the note by cheque on the Bank for £58 10s.

The plaintiff had two accounts in the Bank, a brokerage account and a private account—both operated on in this transaction—the former in its inception, the latter on payment of the sums hereinafter mentioned. The proceeds of the note were placed to the credit of the brokerage account, the interest paid from said account by plaintiff, and a cheque given by the plaintiff on the same day, the 28th September, to E. Woods, on his brokerage account, for a sum of £5,000. Woods endorsed the cheque and obtained a credit on his account in the sum of £5,000.

By means of this transaction Woods' overdraft was paid, a credit balance obtained for Woods to operate on in the sum of £951, reduced by a cheque given by Woods to plaintiff for the sum of £782. On the 4th October Mr. Leigh reported to the Estcourt branch Woods' net overdraft.

The promissory note was not met at maturity, another note between the said parties for the same amount was made, lodged to credit of plaintiff, interest £71 0s. 6d., cheque for £5,000 to Standard Bank paid out the brokerage account, at plaintiff's request, by his cheque.

Before the renewal matured plaintiff was well aware of Woods' embarrassment. Plaintiff pays from his private

account on account of this overdue promissory note £1,000 on March 17, 1890, £250 for each month of April, May and November, and £250 in February, 1891. On the 30th June plaintiff executed a power of attorney to mortgage for Hosking v. £3,000. Mortgage bond was registered on 12th December, StandardBank 1890.

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The defendant had previously written a letter to plaintiff which I shall presently refer to. Defendant writes to plaintiff from Pietermaritzburg on 18th March, 1890, "referring to overdue promissory note of E. Woods in your favour for £5,000, as the scrip held in security has greatly depreciated, I must if you wish the note to remain longer overdue request that you will deposit with me satisfactory security for the balance, and I shall feel obliged if you will kindly give the matter attention." Plaintiff had an interview with defendant in which defendant states that plaintiff promised to pay £250 a month in reduction of this renewal note.

He subsequently paid the sums endorsed on the note on

the dates there specified.

In June, 1890, a power of attorney to mortgage was signed by plaintiff. Defendant wrote to plaintiff on 10th of November, 1890, reminding him of his promise and telling him his account was charged with £250. Some recrimination took place at an interview between plaintiff and defendant, and defendant intimated to plaintiff his intention to execute and register the bond.

The bond was registered on the 12th December and plaintiff's account debited with cost and charges. plaintiff had notice of this intention and took no step to

interdict the passing of this bond.

On the 4th February, 1891, during defendant's absence from the Colony, plaintiff paid a further instalment on the note of £250.

These different transactions amount to this that after being fully aware of all the circumstances and of the financial embarrassment of Woods the plaintiff adopted no measures for asserting his rights or preventing the passing of the mortgage bond at a period when he might have done The plaintiff makes a further payment when, if his contention be correct, he should have stayed his hand. is not necessary to say that these transactions amount to satisfaction or acquiescence, but they are transactions which afford evidence or presumption to the Court that the contention of the defendant is correct.

It is difficult to ascertain the grounds upon which relief is sought for in this action, whether for misrepresentations made by the defendant relating to the credit of Woods to the intent that plaintiff would endorse Woods' promissory

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note, or that the note was an accommodation note, and that the doctrine of suretyship applied, and that the non-disclosure or concealment from plaintiff of Woods' indebtedness, was such a fraud as prevented defendant from recovering in an action, or entitled the plaintiff to rescind the transaction. A passage from the Digest was cited (Dig. 4, tit. 3, sec. 2): "The guilt of fraud is not in him who for the purpose of deceiving uses obscure language, but in him who insidiously and without appearing to do so dissembles what he thinks." The evidence in this case is to my mind conclusive, that Mr. Leigh stated what he believed to be true, and did not dissemble what he thought (Dolus from Digest).

Any intentional misrepresentation of the truth to induce another person to perform an act which otherwise he would

not have performed (Dig. 4.3.44.4).

In such a case of misrepresentation in order to enable a person injuved to sue for damage, a false and fraudulent statement must be made, with a view to deceive the person to whom it is made, with a view to its being acted upon,

and the person acts on it and suffers damage.

If there was fraud in the Manager there arises the question, was it such a fraud as the Bank would be answerable The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. An action will lie in such a case in respect of a false and fraudulent representation as to credit made by a bank manager to a surety intended to be acted on and on which the surety has acted and thereby suffered damage.

There was an expression of opinion of the Manager that considering Woods' position and dealings with the Bank the promissory note would be paid or probably would be paid, and if the Manager at the time, from his knowledge of Woods' accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended it should not be paid, and kept back from the plaintiff the fact which made it improbable, to the extent of being, as a matter of business, impossible, then the defendant and the

Bank would be responsible.

Mr. Leigh had up to that time advanced money to Woods by way of overdraft, and after that date had allowed Woods to overdraw his account. On 29th October Woods' overdraft was £2,265, in November £5,771, in December £5,928.

Mr. Leigh had on 14th September reported or joined in a report to the General Manager's Department on Woods' financial position—"that he, Woods, was respectable and reliable, and that the Estcourt branch considered Woods worth clear £40,000, after deducting liabilities of £20,000."

Subsequently, on the 28th September, 1889, Mr. Leigh in his remarks on bills discounted wrote to the General Hosking Manager as follows respecting this same promissory note:

"S.B.B.—O. Hosking, endorser E. Woods, maker £5,000. Woods thoroughly respectable, reliable." On 17th September, Estcourt branch report that "they consider Woods worth a clear £40,000, and they value his assets at £60,000, his chief assets consist of fixed properties £12,000, good mortgage £9,000, promissory notes £6,000, and gold scrip considerably over £30,000, while his liabilities at date of report were about £20,000, against this promissory note we hold as collateral security under pledge, gold mining scrip to the value of over £5,300 at present prices." I must consider that Mr. Leigh believed the truth of that statement and communicated it bona fide to his superior officer as the truth.

There was no attempt to prevent payment of the note, and no intention on Mr. Leigh's part that the note should not be paid is clear to my mind from security being given in scrip at Leigh's instigation by Woods to plaintiff in the then value of the note and pledged to the Bank by the plaintiff for payment of the note.

In my opinion, the charge of fraudulent representation utterly fails, there was no wilful deceit with the object of inducing the plaintiff to act upon, which is essential to

succeed in an action for misrepresentation.

Mr. Justice Connor stated in his judgment in The London and South African Bank v. C. Behrens, Morcom's L.R., 1869, p. 189: "In Roman Dutch Law the parties were never spoken of as sureties, but the principle in reference to that of surety was as to Bills of Exchange, laid down in Van der Keessel, 594, which says in both these respects that of obligations arising from signing bills for honour of drawer such an obligation differs from that of a person who by a separate instrument has simply engaged himself or intervened as surety for the drawee (Heineccius Cap. III., sec. 27, Cap. VI., 10.11)."

Heineccius De Cam., c. 3, sec. 26, set forth in Story on Promissory Notes, says: "In other words, there were other kinds of contracts connected with bills of exchange and sureties, yet they were not so favourable as in reference to contract sureties, so that instead of the authorities being in their favour they were against them."

A party a surety, in the case of a bill of exchange would be in a less favourable condition than he would under any other transaction of surety. And the learned Judge then 1892.
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goes on to state that "under English Law parties to a Bill of Exchange were treated as surety but not as being placed in the favourable conditions of ordinary sureties." In Wythes v. Labouchere, cited by Mr. Bale, the doctrine as regards the full disclosure of all material facts relative to an advance by the Bank was fully enunciated.

It was previously decided in Hamilton v. Watson (12 C. and F., 109). Lord Campbell there said, "If the principle contended for, that everything should be disclosed by the creditor that is material for the surety to know, be correct, it would entirely knock up transactions in giving security upon a cash account. If such was the the rule it would be indispensably necessary for the Bankers to whom the security is given to state how the account has been kept, whether the debtor was in the habit of overdrawing, whether he was punctual in his dealings, whether he performed his promises in an honourable manner, but unless questions are particularly put by the surety, I hold that it is quite unnecessary for the creditor to make any such disclosure."

In this case there was no concealment as regards any question and answer, and I hold that if there was any concealment proved in this case which, by judgment of the Court, would prevent the plaintiffs in reconvention from recovering under their bond it would be contrary to all the principles upon which the authorities proceed.

It is said in this transaction there was misrepresentation, in fact there was no actual representation at all, and therefore there could be no misrepresentation.

As to concealment, the defendant never undertook to make any disclosure and in my opinion was not under any moral or legal obligation to make any disclosure such as that which it is complained he did not make, under the circumstances on which this transaction arose.

If a creditor is specially communicated with on the subject he is bound to make a full and honest communication of every circumstance within his knowledge calculated to influence the discretion of the surety entering into the required obligation.

But he is not under any duty to disclose voluntarily and without being asked to do so, circumstances unconnected with the particular transaction in which he is about to engage, or to inform him of any matter affecting the general credit of the debtor. If the intended surety desires to know any particular matter of which the creditor may be informed he must make it the subject of distinct enquiry.

Therefore there will be judgment for the defendant in convention with costs.

In reconvention there will be judgment for the plaintiff with costs, and the property declared executable with Hosking

interest at 6 per cent.

No relief is sought or declaration asked for as to the disposal of the scrip deposited with the Bank as security for the payment of the note and of the renewal, the Court decrees that after payment of the bond and interest this scrip must be restored to the defendant in reconvention.

Wragg, J.: The evidence in this case has been so fully analysed and dealt with in the judgment of the Chief Justice that I do not desire to add any further remarks thereon.

I am satisfied on that evidence that there was no fraudulent misrepresentation by the defendant nor wilful deceit whereby the plaintiff was induced to endorse the promissory

note for £5.000.

I agree that judgment should be entered for the defendant in convention with costs and for the plaintiff in reconvention with costs. The interest should be at 6 per cent., and after payment of the bond and interest the scrip, deposited as security and now with the Bank, should be restored to the plaintiff.

TURNBULL, J., concurred.

Judgment for defendant in convention with costs.

For plaintiff in reconvention, with interest at 6 per cent. and costs, and the bonded property declared executable. After payment of the bond and interest, the scrip in the hands of the Bank to be delivered to defendant in reconvention.

> [Plaintiff's Attorney: W. E. Shepstone. Defendant's Attorneys: HATHORN & MASON.]



- July 28 & 29. John Reid (Plaintiff) v. Alexander D. Gilson (Defendant).
 Sept. 2.
- Reid v. Gilson. Jury Law (No. 10 of 1871). New Trial—grounds for refusing. Magistrate liability of for wrongful acts of police.
 - New trial refused (TURNBULL, J., dissentiente) on the following grounds:—
 - Per Gallwey, C.J.:—That, although it might be considered unsatisfactory as to the amount of damages, the verdict was not one which the jury, viewing the whole of the evidence reasonably, could not properly find. The question of damages being peculiarly one for the jury, a verdict ought not to be disturbed on the ground of too great damages, unless the Court be convinced that the jury, in assessing damages, wilfully disregarded the evidence or failed to understand the principle of giving damages.
 - Per Wragg, J.:—That, as the presiding Judge had directed the jury in terms of a judgment pronounced by a majority of the Court (vide 12, N.L.R., 323), a general verdict upon such directions, and upon the evidence, should not be set aside, there being no certainty that real and substantial justice had not been done.
 - Defects in the Jury Law, No. 10, 1871, commented upon.
 - Per Turnbull, J. (dissentiente):—That as the verdict of the jury was not only against the weight of evidence, but was contrary to the legal instructions of the Court—execution having been stayed by the presiding Judge—(rule 3 of 24th November, 1864), and as the presiding Judge was not satisfied that substantial justice had been done (Law 10, 1871, sec. 43), the defendant should be allowed a new trial.
 - Per Gallwey, C.J.:—The liability of a Magistrate for wrongful acts of police acting under his orders, discussed.

[But, for the opinion of a majority of the Court on this legal question of the Magistrate's liability, see the judgments reported in 12 N.L.R., pp. 324-330.]

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July 28 & 29.
Sept. 2.
Reid v. Gilson.

(July 28th and 29th: in banco.)

This was an application by the defendant in the abovenamed cause, for an order setting aside the verdict of the jury at the trial of the action on the 21st May, 1892, and the judgment pronounced thereon, and entering judgment for the defendant, or for a new trial, on the following grounds:—

That the verdict was manifestly against the evidence, the Law, and the legal instructions of the Court.

That the presiding Judge should have withdrawn the case from the jury and entered judgment for the defendant.

That a Magistrate, as head of a Government department, was not liable for the acts of his subordinate officers in carrying out the orders of the Government.

That the damages were excessive.

The facts will appear from the judgments delivered in this and the preceding application (vide 12 N.L.R., 323.)

Morcom, A.G., for the defendant:—The doctrine "respondent superior" does not apply. The instructions upon which the Magistrate acted came to him from the Surveyor General, and he merely handed them on to his police. Even if the police did all that is alleged, the Magistrate would not be responsible. The damages were excessive. The presiding Judge was not satisfied with the verdict, which was contrary to directions given in accordance with the view of a majority of the Court (vide 12 N.L.R., 323). [He cited Lyons v. Martin, 8 A. and E., 512).

Escombe, for the plaintiff:—What was to be considered is not whether Your Lordships would have found the verdict arrived at by the jury, but whether that verdict was such as the jury, viewing the whole of the evidence, might reasonably have come to. (Solomon v. Bitton, 8 Q.B.D., 176; Webster v. Fredeberg, 17 Q.B.D., 736; Metropolitan Dist. Ry. Co. v. Wright, 11 App. Cases, 152; Commissioner for Rys. v. Brown, 13 App. Cases, 133; Ruddie v. L. & S. W. Ry. Co. ("Times" 27th June, 1892, not yet reported); Phillips v. Martin, 15 App. Cases, 193; Praed v. Graham,

July 98 de 29, Best. 2. Reid v. Gilson, 24 Q.B.D., 53; Moreland v. Geikie, 6 N.L.R., 105; Peard v. Perry, 7 N.L.R., 22). A new trial will not be granted where the verdict has been arrived at on an issue properly left to the jury, and is such as reasonable men could reasonably have come to on the evidence. The verdict was not unreasonable or perverse.

Morcom, A.G., in reply, cited § 42 of the Jury Law, 1871; Walkden v. N. G. Bys., 2 N.L.R., 222; Wakelin v. L. & S. W. Ry. Co., 12 App. Cases, 41.

(Our. adv. vult).

GALLWRY, C.J.: This is an application for a new trial. The case was tried before a jury in September, 1891. The jury found a verdict for plaintiff for £145.

An application was made to the Supreme Court for

a new trial in September term, 1891.

The Supreme Court by a majority on November 3, 1891, set aside the verdict of the jury and granted a new trial. The grounds for the application and the reasons given by the Court are recorded in Reid v. Gilson, Natal Law Reports, 1891, p. 323.

The case was retried before a jury on the 18th of May and three following days. The jury found a verdict for

plaintiff in the sum of £257.

The learned Judge who presided at the trial entered judgment for the sum of £257 and costs including the costs of all applications which have been made to the Court in connection with the case.

This is an application to set aside the verdict of the second jury, or for an order granting a new trial or entering judgment for the defendant on the following grounds.

1st.—That the verdict was manifestly against the evidence, the Law, and the legal instructions of the Court.

2nd.—That His Lordship, the presiding Judge should have withdrawn the case from the jury and entered judgment for the defendant.

3rd.—That a Magistrate, as the head of a department of the Government Service of the Colony, is not liable for the acts of the subordinate officers of his department in carrying out the orders of the Government.

4th.—That the damages found by the jury are greatly too much when compared with the evidence in the case.

The plaintiff is a farmer residing in Alfred County. In the year 1888 the plaintiff purchased from the Colonial Government the Lot Waterfall, in extent 125 acres, situate on and forming previous to the sale a portion of the Mur-

chison Flats.

The defendant is since 1889 Resident Magistrate for the Umzimkulu Division. In the year 1888 the Murchison Flats were within the Magisterial Division of Harding. The Division of Harding was divided. The Murchison Flats were in 1889 included in the Division of Lower Umzimkulu, Instalments of the purchase money for the farm were paid to the Resident Magistrate, Harding, and after the division were payable in the usual course to the Resident Magistrate, Lower Umzimkulu. No notification was made to

Instructions were issued from the Surveyor General's Office, that a stop should be put to the practice of allowing persons to graze their cattle on the Crown Lands on Mur-

defendant that this land had been alienated from the Crown.

chison Flats.

The Resident Magistrate issued this order:—

"To whom it may concern—The bearers, Native constables attached to the Court of the Resident Magistrate, Umzimkulu, have orders to remove from unoccupied Crown Lands in this Division all cattle grazing without permission.'—(Sd.)—Alex. D. Gilson, R. M.

Native policemen were sent by the defendant to Murchison Flats to carry out this order on two occasions, the 15th June, 1890, and the 3rd July, 1890. A large troop of

cattle were removed from that locality.

The main issue in this case was whether on these two occasions the Native police carrying out their instructions entered on land in the legal occupation of the plaintiff and then and from there drove off or caused to be driven off the plaintiff's cattle legally depasturing thereon. This was the trespass complained of in the declaration. The point was not raised by the pleadings that the defendant or his police had knowledge or notice that the land from which the cattle were driven was the land of the defendant or land occupied by the defendant.

The office from which the defendant obtained his orders knew of the sale to plaintiff of this piece of land, situate on the Murchison Flats. They did not so inform the defendant

as they were bound to do,

The jury found that the land from which the cattle were driven on both occasions was the plaintiff's land which he

had purchased from the Government.

Before the cattle were driven off on the second occasion, the Resident Magistrate's Clerk admits "that some mention was made to (I suppose me is omitted) by a policeman of a small iron house, I took it to be a temporary shelter for a herd, I don't remember when I heard of it—I can't fix

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orders.

the date—it was mentioned in connection with the driving off of the cattle."

Mr. Cox states "that he was in charge of Scott's cattle at time of first driving. That he conversed with the natives. I told them, the three police, that I thought they would be right in driving Scott's and Armstrong's cattle off, but wrong in driving Reid's cattle as they all seemed on Reid's land." The policeman, Ziwengu, cross-examined on this point, states "I do not remember Cox saying this to me."

Ziwengu states, "We knew the cattle belonged to Reid, concluding that from the position they were grazing. The house, we learned from Reid's servants, belonged to him. We never thought the house belonged to the Government. When I was getting instructions from Harrison we referred We told him the house was a new one, to the iron house. he asked how large and how long the house was. it was just a small one. Mr. Harrison did not warn us to be careful not to drive away cattle from lands not Government land." Makenza, another policeman, stated, "My instructions on 2nd occasion were to drive the cattle off the flats over the boundary. The man who gave the instructions had been told that there was an iron house there, and that the cattle had been driven up to the house, as we had to pass the house."

The jury had this evidence before them sufficient to justify them in coming to the conclusion that there was knowledge in the Surveyor General's Office that this farm had been purchased and alienated. That the defendant, who put the constables in motion, knew or had notice that a portion of Murchison Flats was occupied. That the Native police had seen this iron house erected, which they knew was not a Government house, and that they had mentioned the fact to the person who was deputed to give them

There were further instructions not included in the written order. To remove the cattle from Umzimkulu Division beyond the boundary, i.e., to subject the cattle to another removal from any place where they were driven to, unless grazing was sanctioned in the territory, beyond the boundary or to some lands from which they could be impounded.

The cattle were driven, according to evidence, on to Location lands which were occupied by Natives. There was lung-sickness there in Tambooza's kraal three weeks after the cattle were removed. Witness Lugg said, "I had heard Reid had land in that locality, but I was not communicated with," neither was his locum tenens, who deposed,

"The Natives were sent in June and July without reference July 28 & to me."

It seems to me that this officer and his agents acted Reid v. Gilson, negligently and oppressively in carrying out their rights to remove these cattle.

. . . .

The cattle were driven off private lands, no place was appointed or fixed for their temporary detention, the cattle were driven on to Location lands; the persons who drove the cattle abandoned them, left them unherded on lands from which they could have been removed or impounded.

Voet declares the Law on this point (Voet 9.1.3): "As regards animals trespassing, is that an owner of ground whose crops have been injured by animals trespassing, may, when they are caught upon his premises, shut them up in a public pound until the amount of damage done has been paid or the animal surrendered, but such a person is not allowed even now-a-days to shut the cattle up in his own private stable or to detain them privately in any other way than has been pointed out, on account of trespass."

Van Leeuwen, Bk. 4, ch. 39, sec. 6: "And if an animal be found on another's land it may be placed in a pound or enclosure appointed for the purpose until its owner, upon payment of the damage and expenses, releases it therefrom." The Pound Law 25, 1874, sec. 8: "That any cattle trespassing on unleased Crown land shall not be liable to be

impounded."

Cattle straying and trespassing on Crown Land may be driven, but there should be provided some station or place on Government Land where they may graze and be protected from straying into Location, private, or other Crown

The defendant and those acting under him could have prevented this trespass on plaintiff's lands, and have not done so. They had information and notice and made no The Law is that he who procures a wrong or trespass is a joint wrong doer and may be sued alone or jointly with those who do the wrong. This canon was adopted in Rogers v. Dutt and others, 13 M.P.C. p. 209, where The Right Honourable Dr. Lushington, in giving . . . "Neither does it seem to them judgment, stated to conclude the question in the action, that the act complained of is to be considered as the act of the Government, and that in the part which the defendant took in it, he acted only as the Officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the plaintiffs. For if the act which he did was in itself wrongful, as against the plaintiffs, and July 28 & 29. Sept. 2. Reid v. Gilson.

produced damage to them they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the Superior Power. The civil irresponsibility of the Supreme Power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration. Neither in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action; an imprisonment of the person, a battery, a trespass on land, are instances, and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet, if any damage, even in legal contemplation, be the consequence, an action will lie."

The Privy Council explain the case of Van Rooyen v. Van der Reit (2 M.P.C.C., 177), cited in Palmer v. Hutchinson, 6 App. Cases, 619, and state, the only right to sue the district secretary and treasurer which was recognized by the Judicial Committee was a right to sue him personally for money

received by him.

It was urged in argument that this action did not lie against the defendant on the ground "That as he was acting under orders he cannot be said to be guilty of negli-

gence."

In Hodgkinson v. Fernie (3 Jurist. N.S., 818). A transport ship came into collision with another transport ship, employed by the English Government and commanded by naval officers to whose orders the captains of transports were subject.

These ships were ordered to anchor, The Courier hung on to her warps, agreeably to the express orders of the naval captain. She collided with the Sultana, a breeze having

sprung up.

C. J. Cockburn left the question to the jury, whether there was not negligence in The Courier not having anchored when the breeze sprung up. The jury found there was negligence and found for the plaintiff. The Court on

Appeal refused to disturb the verdict.

The practice in England is not to disturb the decision of juries if facts which the law has confided to juries and not to judges when juries are empannelled unless the decision was one which a jury viewing the whole of the evidence reasonably could not properly find.

The Privy Council in *Phillips* v. *Martin* (15 Appeal Cases, 193), have applied that doctrine to appeals for new trials

in jury cases.

The Natal Jury Law provides that all matters relating to trial by jury in civil cases shall be determined as nearly as practicable according to the Law and usages of England. This Court should adopt the principle I have above alluded to.

It is a question therefore whether or not the power to order a new trial should be exercised in this case.

The verdict is not satisfactory as to the question of damages. We have not the means of ascertaining the items upon which the jury assessed the damages. The evidence is not conclusive that actual damage to the extent of £257 was sustained.

In the former new trial motion the defendant complained that £147 damages found by the jury was excessive.

The question of damages, especially in tort, is peculiarly

one for the jury.

To alter it would be in fact to substitute the Court for a jury. And the Court in deciding on the question of damages should be convinced that the jury in assessing the damages wilfully disregarded the evidence or failed to

understand the principle of giving damages.

I cannot disturb the finding of the jury, in favour of defendant. The order of the Judge seems to me to include all costs except the costs of this application. Assuming that the Judge did not intend to award all these costs or had no power to do so, the practice is that the event which the costs follow is the conclusion of the whole proceedings commencing from the summons and ending with final judgment, and that the party who succeeds in his action is, in the absence of any special orders, entitled to the whole costs of the whole action under order.

The plaintiff succeeded in both jury actions, so he was right throughout, and in my opinion entitled to all his costs.

In Field v. G. N. R. (3 Exchq. 261), and Creen v. Wright (2 C. P. D., 354), the above principle was held under order.

Judge Bramwell stated "I think if the order were not in existence then the successful plaintiff ought to be entitled to get these costs," for former trial and application for new trial.

WRAGG, J.: My learned brother, Turnbull, who presided at the second trial, directed the jury, as I understand, in terms of the judgment pronounced by a majority of this Court when the motion for a new trial was allowed (N.L.R. 12, 323). Upon those directions as to the law, and upon

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the evidence addressed, at great length, de nevo, the jury found a verdict in plaintiff's favour for £257, an amount greater by £111 than that awarded by the jury at the first trial before the learned Chief Justice.

This second verdict is a general one, and we have no definite information concerning any specific grounds upon which the jury based their verdict. Therefore, we must assume, I think, that the jury found, upon the evidence, that the defendant, wilfully and with knowledge that he was acting beyond the scope of the instructions given to him by the Government, ordered his subordinate policemen to drive the plaintiff's cattle from the plaintiff's private property, that those cattle were in fact so driven from that property, and that the damages, which they have assessed at £257, were suffered by plaintiff as the direct consequence of such driving.

Upon all these points and upon the same evidence, I am bound to confess that I myself should have arrived at conclusions opposed to those at which we must assume the jury to have arrived. However, the numerous authorities quoted to us clearly shew that Judges are slow to interfere with the findings of juries upon evidence, and, as the learned Judge laid down the law consistently with the opinions of a majority of this Court, it is difficult for me to say, in terms of the 43rd section of our Law No. 10 of 1871, that I am fully satisfied that substantial justice has not been done at this second trial. Interest reipublica ut sit finis litium. For the above reasons, with reluctance and not without anxious hesitation, I have come to the conclusion that this second verdict must stand.

In my opinion, our Jury Law, No. 10 of 1871, sorely needs amendment. The Supreme Court should have power to refuse a jury whenever the points of law involved are so numerous and important that it is not desirable that the risk of misunderstanding by a jury should be incurred, and in cases tried with a jury power should be conferred, in unmistakeable terms, upon the presiding Judge to refuse a general verdict and to require the jury to give answers to specific questions left for their consideration, upon which, with regard to the law of the case, he should enter judg-I think that the present case illustrates the imperfections of our jury system. It was essentially one for decision by the three Judges of the Supreme Court. tried, however, with a jury, and judgment should have been entered by the presiding Judge upon the jury's answers to questions of fact, left to them by the Judge, with reference to the law of which he was the sole interpres.

TURNBULL, J.: I should be glad that there were an end to this unfortunate litigation, but I regret that I feel myself precluded, owing to my reading of our Jury Law 10, 1871, Reid v. Gilson. from agreeing with my learned brethren in their present decision.



As I expressed my opinion last November, when the Court by a majority consented to a new trial, that the first jury gave a verdict against the weight of evidence; so now I consider that the jury who tried the case before me in May 1892 returned a verdict not only against the weight of evidence on the facts, but in opposition to my legal instructions.

It was in consequence of this that on the application of the defendant's Counsel I stayed execution in terms of Rule

3 of our Rules of Court of 24th November, 1864.

No doubt were I to be guided by the system of practice prevailing in England, but which I consider goes beyond the provisions of our own law as regards the importance attached to the findings of juries, I might feel justified according to the maxim, "ad quæstionem facti respondent juratores," in letting the last verdict stand; but as I am not fully satisfied that substantial justice has been done (sec. 48 Jury Law, 1871) I would not refuse to allow the defendant a fresh trial.

Per curiam: Application refused, with all costs, including those of this motion.

> [Applicant's Attorney: J. P. WALLER. Respondent's Attorney: W. E. PITCHER.]

In re HERBERT WILLIAM WILKES

Advocate or Attorney—admission. Practice.

Sept. 2. In re Wilken.

An advocate or attorney, when appearing in Court to take the oaths upon admission, must be robed,

(In banco).

Morcom, A.G., presented the petition of the above-named applicant.

The Court intimated that the practice indicated in the

head-note should be adopted.

Per curiam: Order for admission.

1892. July 29 & 30. Sept. 2 & 3. H. & T. McCubbin (Appellants) v. Archibald & Co. (Respondents).

McCubbin v. Archibald & Co.

- Pledge—following. "Ordinary course of business." Setoff—mutual credits and debits. Costs, where plaintiff partly successful.
- A. & Co. supplied goods to H. and took from him in part payment sundry plough-fittings, belonging to his stock-in-trade, in part payment. H.'s stock-in-trade was under bond to M., such bond prohibiting disposal of the security save in the usual course of business. M. sued A. & Co. for return of the plough-fittings or their value.
- HELD: That as the surrounding circumstances showed that the transaction was one in the ordinary course of business, the action failed, and that the defendants were entitled, as a set-off, to the value of the goods supplied by A. & Co. to H., but that, as the value of the goods so supplied exceeded that of the plough-fittings, judgment should be given for the plaintiff for the amount of such excess.

Under these circumstances, as the plaintiffs had substantially failed in their action, each party ordered to bear his own costs.

(In banco).

This was a review of the judgment of the Magistrate of Durban. The plaintiffs sued for the return of certain plough-fittings and other goods from defendants, or payment of £67 10s., their value.

The evidence showed that the defendants, Archibald & Co., supplied certain trade goods to Hart, a store-keeper, to enable him to carry on his business. Hart's stock-intrade was pledged to the plaintiffs, H. & T. McCubbin, by notarial bond, which prohibited disposal of the stock otherwise than in the ordinary course of business, but did not preclude the mortgagor from replenishing his stock by purchasing as he did from a third person.

The Magistrate held that the transaction was bona fide and in the usual course of business, but gave judgment for the plaintiffs for £5, being a sum found to have been lent by defendants to Hart to pay a fine imposed upon the latter. On the ground that the main claim had failed, the July 29 & 30.

Sept. 2 & 3. appealed on the following grounds:-

(1) That the transaction was not one in the ordinary Archibald course of business.

(2) That defendants were aware at the time of such transaction that the goods purposed to be obtained from Hart were under the latter's bond to plaintiffs.

(3) That plaintiffs were not informed of and did not

consent to the transaction.

(4) That defendants, being aware of the bond, could not without plaintiffs' consent change the security, and that

such transaction was not bona fide.

(5) That defendants having, with knowledge of the bond, supplied goods to Hart without knowledge or assent of plaintiffs, were not entitled to claim as against plaintiffs the benefit of any such supplies.

(6) Want of evidence of benefit derived by plaintiffs from the supply of goods, and existence of evidence that upon realisation of the property under pledge there re-

mained a deficiency owing by Hart to plaintiffs.

(7) That defendants took more goods than they were entitled to.

(8) That in the absence of any tender, the plaintiffs should have been awarded their costs.

W. Burne, for appellants, cited Platt v. Stainbank, 2 N.L.R., 167; Turner v. Colville, 4 N.L.R., 6; Payne v. Fern, 6 Q.B.D., 620; Taylor v. McKeand, 5 C.P.D., 358; and on the question of costs, King v. Sikonyela, 12 N.L.R., 245; Van Wyk v. Faber, 2 Buch. E.D. Rep., 152; Bennett & Webster v. Cotzee, 1 Juta, 285; The London and S.A. Expl. Co., Ld., v. Kimberley Town Council, 1 Griq. W. Rep., 156 and 157; The same v. Howe & Co., 4 ibid., 214.

Morcom, A.G., for respondents, cited as to "ordinary course of trade" Tucker v. Austin's trustees, Buch. Rep., 1868, 167; The National Mercantile Bank v. Hampson, 5 Q.B.D., 177; Warwick v. Ford Bros., 3 N.L.R. (July), 5; 3 Burge, 572; as to the vindicatory action, Voet 6.1.12; as to costs, Young v. Thomas, 2 Chan. Div. (1892), 134; Huxley v. W. London Ry. Extension Co., 17 Q.B.D., 373 and 14 App. Cases, 26.

GALLWEY, C.J.: I have come to the conclusion that the transaction in this case was bona fide. It appears that it was arranged that the ploughs and fittings should be given in exchange for fresh goods, which goods became portion 1986 July 20 & 34 Sopt. 2 & 8.

McGabbin r. Archibald & Co. of Hart's stock-in-trade. The evidence shows that the value of the ploughs exceeded that of the goods, &c. The question is, are these goods to be taken as a set-off? The action has been brought with the object of proving that the sale of the goods was not bona fide, but the Magistrate has found otherwise, and we agree with him so far. When, however, the accounts are gone into, it appears that the Magistrate was wrong in his figures, and that he ought to have found for plaintiffs for £10 2s. 7d. His judgment will be corrected accordingly; and as the plaintiffs have substantiated their claim in part, each party will have to bear his own costs. [See Roberts v. James, 2 Q.B. (1892) 194.]

Wragg, J.: It is sought by the applicants to show that the transaction between Hart and Archibald & Co. was not bona fide. It is clear to me, on the evidence, that the business was in the usual course of trade and that it was bona fide. The only difficulty is that, whereas Archibald & Co. received ploughs and plough-fittings valued at £44 11s. 1d., the goods supplied in exchange to Hart only amounted to £34 8s. 6d.; Archibald & Co. thus removed goods to the value of £10 2s. 7d. more than they were entitled to. think, therefore, that the Magistrate should have found that, to that extent, Archibald & Co. were spoliators and should have given judgment accordingly. As to the main issue, the Magistrate clearly decided against the appellants, and in that we think that he was right. Having so found, he was entitled to refuse the appellants their costs. order now made by us is that each party do pay his own costs both here and in the Court below.

TURNEULL, J. (after referring to the facts): The sale was a bona fide one, and in the ordinary course of business. I am also of opinion that the difference between the value of the ploughs sold by Hart and the goods supplied to him belongs to the plaintiffs. That amount is £10 2s. 7d., and to that extent plaintiffs are entitled to succeed. As to the item of £5 referred to in the Magistrate's judgment, it is not mentioned in the pleadings. We find that £10 2s. 7d. is due to the plaintiffs, and the Magistrate's judgment will be altered accordingly. I agree as to costs with my learned brethren.

Per curiam: The Magistrate's judgment turned into a judgment for plaintiffs for £10 2s. 7d. Each party to bear his own costs.

[Appellants' Attorney: W. Burne. Respondents' Attorney: W. E. Shuperone.]

The Castle Mail Packets Company (Limited) (Appellants) v. MITHERAM AND TOTERAM (Respondents).



Carrier by sea. Passengers luggage. British ship trading Mitheram and to Natal from foreign Port. Contract, conditions of, and law applicable to.

- In an action in respect of loss of passengers' luggage from a British ship voyaging from a foreign port to Natal, HELD, (TURNBULL, J., dissentiente): - That, the general rule being that the rights of parties have to be judged by the law of that country by which they may justly be presumed to have bound themselves,—the law of the ship governed the case, and not the law of the place of performance.
- (2) Held, further: —That the contract between the parties was defined by the passenger ticket given by the defendants to the passenger, and the printed conditions, endorsed and referred to on the face thereof, in the English language.
- (3) Held, further: That the defendants being bound to place passengers' luggage in the wharf-shed at Port Natal, or at least to land it, there was an implied condition in the contract to that effect; and, that, as the defendants had compelled the plaintiffs to leave the ship, they became responsible for the safety of the luggage left on board; and, having omitted to take proper care of it, were liable for loss arising from their negligence, not including merchandise and specie shipped in fraud of the contract.
- [Per Turnbull, J., (dissentiente):—That, the form of passenger ticket put in before the Magistrate being in terms not applicable to any contract between the parties, could not be received as evidence of any such contract. That, as the plaintiffs could not read English, they were not bound by conditions printed on the ticket which were not explained to them. That, the plaintiffs having paid an additional sum for a passage between decks, there was a parole novation of any original contract for a deck

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Castle Mail Packets Co. v. Mitheram and Toteram. passage which had the effect of bringing the parties under the common law of Natal.]

(In banco-before GALLWEY, C. J. and WRAGG, J.)

This was an appeal from the judgment of TURNBULL, J., in a case heard before the Durban Circuit Court in February, 1892, on review from the Magistrate of Durban (vide 13 N.L.R., 78).

The facts are fully set forth in the judgment appealed from (already reported, as above) and in those pronounced on this appeal.

The grounds of appeal were as follows:—(1) Contributory negligence. (2) That the plaintiffs were warned that the ship would not be responsible for their luggage. (3) That the ship became a gratuitous bailee of the luggage. (4) That there was no declaration as to the merchandise claimed for. (5) That there was no evidence of negligence on the part of the Company, nor (6) as to the contents of the boxes or of actual loss.

Morcom, A.G., for appellants:—The law of the flag, not that of this Colony, is applicable, as the parties did not intend bringing themselves under Portuguese law. P. and O. Co. v. Shand, 3 M.P.C., N.S., 272; Lloyd v. Guibert, 1 Q.B., 115; in re The Missouri S.S. Co., 42 Chan. Div., 321; The "Marie" 7 P.D., 203). The liability of a carrier in respect of passengers' luggage is shown in Reynolds v. D. Currie and Co., N.L.R. (1875) 1; Harris v. G. W. Ry. Co., 1 Q.B.D., 515; Talley v. G. W. Ry. Co., 6 C.P., 44: and Becher v. G. E. Ry. Co., 5 Q.B., 241. And, in respect of merchandise not being personal property, in Cahill v. L. and N. W. Ry. Co., 31 L.J., C.P., 271; G. N. Ry. Co. v. Shepherd, 21 L.J. Exchq., 286; Belfast & Ballymina Co. and another v. Keys, 9 Clark's H.L. Cases, 556; Cohen v. S. E. Ry. Co., 2 Exchq., 253; and Angell on Carriers, sec. 115. [He then referred to the evidence.]

Wylie, for respondents:—The lex fori governs the case. (Reynolds v. Donald Currie and Co.—vide supra; Parker Wood & Co. v. Bullard King & Co., N.L.R., 1876, 18). The respondents being foreigners, unable to read English, the conditions of the contract should have been explained to them. (Stretton v. Union S. S. Co., Buch. E.D. Rep. (1881) 315; Harris v. G. W. Ry. Co.—vide supra.) The evidence showed negligence on the part of the Company.

It could not have been the intention of the parties that a contract entered into in Delagoa Bay for conveyance to Durban should be governed by English law.

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(Cur. adv. vult.)

Postea: September 8, 1892 (in banco).

The following judgments were delivered:-

GALLWEY, C.J.:—The evidence is very incomplete in this case, and it is difficult to infer the complete facts, to draw therefrom the inferences upon which the law is to be decided.

The "Melrose" is an English steamer, owned by a Company having their place of business or offices in London, and registered in London under the Merchant Shipping Act. Her Captain is an Englishman or British subject.

In September last the "Melrose" was lying in Delagoa Bay preparing to sail for Durban. The plaintiffs secured a passage by the "Melrose" from Delagoa Bay to Durban, paid their fares, and received a passage ticket, where or when it is not stated. The transaction is thus tersely described by Mitheram:-"I was a deck passenger. paid £2 10s. for my passage. I got a ticket for that. only got one ticket, it was given to the ship. I paid 30s. more for which I was allowed a cabin. (A passenger ticket copy put in). I had two boxes as luggage, a small and a large box. The large box was left on deck the little one taken to cabin." The "Melrose" arrived in Durban between 5 and 6 p.m. on the 18th of September. plaintiffs could not read the conditions on the ticket. knew however that there was some regulation that deck passengers took care of their own luggage. This is not a The first question I have to decide condition on the ticket. is, what was the law under which this contract v as taken, and which law is to govern. The general rule in these contracts that the rights of parties to the contract are to be judged by the law of that country by which they intend to bind themselves or rather by which they may justly be presumed to have bound themselves.

It is stated in *Macnamara on Carriers* that a contract with a Railway Company is made by payment of money by the passenger, in exchange for a ticket which operates as a receipt for the money and specifies to some extent the particulars of the contract.

This passage ticket given by the ship to the plaintiffs has inscribed on it some conditions, containing words



exempting the ship owners from all liability for loss, damage, or detention of luggage. There is also a memo. in large print on the face of the ticket :- "Issued subject to the further conditions printed on the back hereof." The conditions are printed in the English language and are conditions generally used in English registered passenger ships. In Lewis v. M'Kee (2 Exchq., 37) Justice Willes states that upon delivery by one of two contracting parties to the other of a written document stating the terms on which the party who produces it proposes to contract, the other party acts at his peril if he does not read it, and restated what he had stated in Van Toll v. South Eastern Railway Company (31 Law Journal C.P., 241): "Assuming that the plaintiff had not read the terms of the conditions it is evidence that she knew they were there, and she was satisfied to have the goods upon those terms. She must be taken to have assented to the terms, or if she did not assent, she knew that they were terms which the Railway Company intended to stipulate for." This ticket defines the contract, the shipowners contracted under English law.

There is no exception in that ticket making any departure from English law, and there is no evidence that the parties showed a different intention to contract for their

passage than under English law.

Justice Willes in Lloyd v. Guibert (1 L.R. Q.B., 115) puts Whis question: "Does a British ship which visits many ports in one voyage, as in this case, whilst she undoubtedly retains the criminal law of England, put on a new sort of civil liability at each new country she visits in respect of cargo there taken on board? But if the locality of the contract is to govern throughout, an Englishman going from Vigo to Lisbon on the same voyage would be under English law as to crimes, but under Spanish law as to the Mr. Justice Willes states this is contract of carriage." not an extreme nor exceptional case, it ordinarily gives rise to the question which law is to prevail. The absurdity which would follow from adopting the lex loci in preference to that of the vessel is strong to prove that the latter ought to be resorted to. The learned Judge Mr. Justice Turnbull inclines that the law of the place of performance should be resorted to. In that view I cannot give my concurrence. To do so I should dissent from Lord Justice Turner's instructive judgment in the Peninsular and Oriental Steam Navigation Company v. Shand (3 Moores P.C.C., N.S. 272) where the passenger in a vessel from Southampton to Maurithus sued in Mauritius for the loss of luggage upon an whered limitility under French law from which the shipowner was exempt by English law. The Privy Council overruled the judgment of the Mauritius Court and held that the law of England governed the case.

This resort to the place of discharge for the law is based on an expression of Sir H. Connor in Reynolds' case (vide little supra) "I think we can understand something taking place in Natal waters, connected with the luggage which might have to be decided by Natal." That observation was correct to this extent, as to the mode of delivery, or mode of taking cargo on board, the usage of the Port would be regarded. That observation had no bearing in Reynolds! case as the negligence which occasioned the injury was proved to have occurred at the Cape during the transhipment of the luggage from the "Windsor Castle" to the "Florence." In a later case Parker Wood & Co. v. Bullard. King & Co. (vide supra) Sir H. Connor said "I assume from the decision in Shand's case (vide supra) that the contract under the bill of lading, made in England must be construed according to the law of England."

In Black v. Rose (2 M.P.C., N.S. 277) an appeal from Ceylon, the Privy Council stated the whole question resolves itself into one of construction of the charter party, an English contract, and it is not affected by the custom of the Port of delivery. It seems that the doctrine of part performance applicable to a Bill of Exchange cannot be extended to and adopted in cases of a contract on a passage

from one Port to another.

In most of the cases as to the law lex solutionis the fact of the payment of the money at the particular place enters largely into the consideration of the intention of the parties. Story on Conflict of Laws, sec. 280, discusses the question with his usual clearness. He instances that the fact of the naming a place of delivery affords evidence that the law of that place was intended by the parties as the law which should govern their rights and duties. Story then states "The Courts are not agreed upon this propesttion, citing Shand's case (vide supra) and Moore v. Harris (1 App. Cases, 318) and further sustains that statement by citing the Missouri case (vide supra)." Story says it is difficult to escape the conviction that the Courts in applying the law of the place of performance have sometimes been actuated by a desire to impose liability on the carrier. The mere fact that the delivery was to be made in a particular place can hardly be evidence that the law of that place should govern. The loss might occur before it reached that place and it is not denied that the law of the place of the loss is not to govern in the absence of evidence of intention.



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In the *Missouri* case (vide supra) a contract in usual form was made in Massachusetts between an American citizen and a British shipowner for the conveyance of cattle from Boston to England in a British ship, there was contained a stipulation exempting the Company from liability for loss of cattle occasioned by the negligence of the master and crew.

In an action for loss of cattle occasioned by negligence, held and affirmed on appeal, that the contract showed that the parties intended the contract to be governed by English law, though primâ facie the lex loci contractus should be the law observed.

Where the contract is in part to be performed in a country different from the country where the contract is entered into, there is no case to show that the law of the country in which part of the contract is to be performed

can be the governing law.

In Harris' case (1 Appeal Cases, 318) the Privy Council held that a contract made in England to convey goods to Montreal must be governed and interpreted by the Canadian Courts according to the law of England. It seems doubtful whether the rule concerning the place of performance has any proper application to this class of cases (Carriers) unless there is better evidence of intention than is afforded by the fact of delivery, Story gives as instances of the law strictly applicable to and governing the lex solutionis. Promissory notes drawn in England and payable in France or vice versa. Interest when due on a contract to be performed in a foreign State. what law would govern when the parties to the contract were of different States or nationalities, it might be difficult to determine in the absence of evidence of intention. That difficulty is not present in this appeal. The intention of the parties is evidenced by the contents of the passenger ticket, given by the shipowners and accepted by the plain-The main question argued on this appeal whether the contract between the parties had incorporated in it certain conditions, printed on the face and on the back of the ticket.

The second question, if so, whether these conditions were legal and what is their proper construction. The plaintiffs did not sign the ticket. The House of Lords decided in Henderson v. Stevenson (2 L.R.H.L.S.C. 470). The passenger ticket had there on its face only the words "Dublin and Whitehaven." On the back were printed words "The Company incur no liability in respect of loss of the passengers luggage, whether arising from the act, neglect or default of the Company or their Servants." The pas-

senger received this in that form without knowing anything of the endorsement, and it was stated and relied on that he never read the conditions.

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The House of Lords held that the passenger did not contract in terms of these conditions, that the endorsed conditions were not incorporated in the contract.

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In giving judgment the Lord Chancellor Cairns stated (p. 473) that there was nothing upon the face of thec ontract referring him to the back.

Lord Chelmsford stated "assent is a question of evidence."

The tickets issued to the plaintiffs in this case had inscribed on the face thereof these words printed in large type, "issued subject to the further conditions printed on the back hereof."

In Parker v. South Eastern Railway Coy., (2 C.P.D., 416) the Court of Appeal held that a person depositing a bag in the cloak room, receiving a ticket on which were written the words "see back" although not bound to read the condition on the back, was concluded by the condition—because he knew there was printed matter, and must have known it concerned him. In Harris' case (1 Q.B.D., 515) another cloakroom case—the ticket had printed on the face "subject to conditions on other side." The Court held that the baggage must be taken to have been deposited subject to the conditions on the back of the ticket. See also Wilton's case (30 L.J.C.P., 369).

In Burke v. South Eastern Railway Company (5 C.P.D., 1) a passenger engaged a passage from London to Paris. A paper book with eight leaves was issued as the ticket. On the cover of the book was printed the name of the Railway and the words, "Cheap return ticket London to Paris, second class."

There was no reference on the cover to any condition in the book, one of which was limited liability.

Held that the whole book was the contract, distinguishing it from *Henderson* v. *Stevenson* (vide supra) on the grounds that in turning over leaves to use coupons he had under his eyes the condition limiting the liability on their own train boats.

In Watkins v. Rymill (10 Q.B.D. 178) the Judges of the Queen's Bench Division held that a receipt for a waggonette followed by the words "subject to the conditions as exhibited upon the premises," which receipt the receiver placed in his pocket without reading it, the plaintiff was bound by the conditions. I allude to this case as it was cited in the House of Lords in Bunch v. South Western Railway Coy., (13 App. Cases, 31) where they admitted that conditions which were incorporated by a notice on the 1992. May 30 & 33, Sept. 8.

Castle Mail Packets Co. v. Mitheeam and Toteram. ticket exemerated the defendants from liability whether the passenger saw the notice or not. In my opinion, therefore, this passenger ticket, with the various conditions on its face and on its back, formed and contained the terms of the contract between the plaintiffs and defendants.

I consider that the contract was not terminated on the arrival of the "Melrose" at the wharf. The defendants were bound to place luggage in the shed on the wharf in order to pass through the Customs, or at least land the luggage, and that was an implied term in this contract. In the ticket passengers are advised to mark each parcel

to prevent mistakes on landing.

The defendants omitted to land the luggage though they had time and opportunity, and in my opinion they contravened their contract in not delivering this luggage on the wharf into the usual shed. The defendants compelled the plaintiffs to go on shore. They did not remove their luggage, they had no friends to receive them. It was the duty of the defendants to remove the bulky box from the deck, or to place it, in the absence of the plaintiff, in the luggage room or some place of safety.

The defendants became liable for the safety of the

luggage.

The ship had ceased to be employed on a passenger trip for that voyage. She was rapidly changed and was being

prepared for another voyage.

The plaintiffs and defendants agreed that there existed a rule in the Company's contract for the conveyance of passengers that deck passengers took charge of their own luggage, and in such cases the obligation to take reasonable care would naturally arise, so that where loss occasioned it fell on the Company only in the case of negligence in some part of the duty which pertained to them.

In the present case the Company did not land the box, the officer of the Company when the plaintiff refused to leave the cabin, reported it to the Chief Steward who said "See that they go," and they went leaving the box on deck.

The cargo was transhipped at night, workmen were employed from shore. The box left upon the deck was

broken open and contents rifled.

I decide that the Company did not perform their contract by not landing this box, that they compelled the passengers to leave their ship, and that the luggage of the plaintiffs came under the Company's care; they did not take proper care, and the loss occurred from their negligence dans locum injurise. The box containing the money was shipped in fraud of the contract, the contents were not disclosed to the Company. The box was such a box as any

passenger would carry and would be bound to carry with him in his hand when he landed. My judgment is, therefore, that the Company is liable for such articles in the box as could be classed as luggage—distinguishing personal jewellery from jewellery for sale. Judgment for Company reversing so much of the Judges decision as refers to the money in the small box and jewellery for sale.

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WRAGG, J.: I agree in the judgment just pronounced.

TURNBULL, J.: I regret that I cannot concur with my learned colleagues in the decision that they have arrived at in this case; and I now wish that I had been present when the judgment transmitted by me to Durban on 12th April last (see Vol. XIII, N.L.R., p. 78) was brought before this Court on appeal. Why I did not then attend was that I had so carefully considered the reasons for my judgment that I did not see that I had anything to add or to take therefrom. Before stating on what points I chiefly differ from the judgment just delivered by the learned Chief Justice, I think it well to refer to the several principal grounds on which the application for an appeal from my judgment was made.

The 1st ground was that on the afternoon of the arrival of the ship at Durban the plaintiffs were requested by the ship's officers to leave and take their baggage with them, but instead of doing so the plaintiffs refused to leave the ship although there was ample daylight and opportunity. Now, on the contrary, the evidence to my mind as regards this showed that at 9 p.m. they were ordered off and shoved out of the ship, and were not allowed to take the small box with them which Mitheram

told the steward contained money and valuables.

The 2nd ground of objection was that the plaintiffs were warned at such time that the ship would not be responsible for their luggage. On the contrary, the evidence convinced me that they were not allowed to take their luggage with them although the small box could have been easily

carried by Mitheram or his servant Toteram.

The 3rd ground of objection was "that at the time of the breaking open of the boxes (if they were broken open by others than the plaintiffs themselves) the defendants vessel was a gratuitous bailee as to the said lugguge." A more absurd assertion or contention I never heard, namely, that a man compelled against his will to leave his lugguge in the possession of another person should be constrained to look upon this person as a depositary or mandatory; whereas in fact, as I shall shortly show, this person was a

May 80 & 81. Sept. 8. spoliator, or at least guilty of negligence so gross as not to excuse even a gratuitous bailee of liability.

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The 4th ground asserts "that the plaintiffs made no declaration at the time of taking their passage at Delagoa Bay, or at any subsequent time that their packages contained merchandise and other articles not being incidental to the contract of the carriage of a passenger; whereas in fact merchandise and other articles were so contained and claimed for in this action."

I shall go no further with the grounds of appellants objections as I consider that this brings us to the subject of the contract between the parties, and as regards which I am entirely at difference with my learned colleagues. will be seen that the counsel for the appellants only incidentally alludes to a contract, whereas in the judgment just delivered by the learned Chief Justice it will be seen that His Lordship attaches great importance to a form of contract which the plaintiffs counsel in the Magistrate's Court either put in or allowed to go in, but which I declined to take as evidence for the simple reason that it was only admitted by Mitheram to be like the paper he got when he paid for a steerage or third class passage—it was printed only in English—it purported to be securing a passage from Durban (instead of from Delagoa Bay) where the passenger was to embark at the Point for some unknown port or place, and it also purported to be issued from the Durban agency. Further, the reference to being subject to the conditions printed on back thereof were printed across the form on the left margin thereof along some ornamentation, and required to be looked for before it met the eye. I would ask would such a document have been considered a ticket by the Privy Council in Shand's case (3 Moon P.C., N.S., 273) or in the cases of Parker and Harris referred to in my judgment last April, and mentioned by His Lordship the Chief Justice on this occasion? I think not. I am of opinion that no reference would have been permitted to such an informal document. However, assuming it to be considered a proper ticket, and that the Arabs, on paying £2 10s, received it at Delagoa Bay; are they to be considered bound by the conditions printed upon it? Is it to be assumed that the Castle Company did what was reasonably necessary under the circumstances to convey to the minds of these Arab passengers, that the document handed to them contained certain conditions which were to affect them as regarded their luggage. The evidence goes to show that the so-called ticket was printed in the English language, which language the plaintiffs could neither speak nor read, and which printed matter was not ex-

plained to them; surely then it cannot be contended that they, the plaintiffs, were binding themselves by conditions of the existence of which they had not the slightest idea, and with which, without explanation given to them, they As Mitheram and had no opportunity to make themselves acquainted. to what since 1876 has been considered the principles on which to establish the liability of a passenger as regards his reception of a luggage ticket, see Parker's case v. S. E. Railway Co., L.R. 1 C.P. Div. p. 618, where Lord Justice Mellish referring to the case of Harris v. Great Western Railway Co. (L.R., 1 Q.B. Div. 515 and 522) said "The question to consider is whether the Company were entitled to assume that a person depositing luggage and receiving a ticket in such a way that he could see that some writing was printed on it, would understand that the writing contained the conditions of the contract, and this seems to me to depend upon whether people in general would, in fact, and naturally, draw that inference.

"The Company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits

luggage with them.

I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may reasonably

be expected of a person in such a transaction.

"The Company must take mankind as they find them, and if what they do is sufficient in general to indicate that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons, on account of his exceptional ignorance, stupidity, or carelessness; but if what the railway do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit, without obtaining the consent of the persons depositing them to the conditions hinting their liability." (The italics are mine).

The present case I consider is unique amongst cases of passenger luggage tickets; and all the decided cases seem so far as I can discover to have been decided by English law in regard of tickets printed in English, and mostly issued in England; but in this case the so-called ticket was no doubt printed, so far as it was printed, in English; but was issued in a Portugese country to a foreigner who did not speak or read English, and it was not explained to him; and so I think that this is not one of those cases where Lord Justice Mellish thinks that the Company or Carrier has a right to assume that the passenger understands the English language, or the language the ticket is

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printed in. This being so, I am of opinion that even had a ticket, printed in English but not explained to them, been handed to the plaintiffs, they would not, under English law, have been bound by the conditions either printed on the face or back of the ticket.

The law connected with this subject is very fully set forth in the Cape Colony case of Stretton .v. Union Steam Ship Company, (Limited), E.D.C. Reports (Buchanan, 1881), p. 315, in the exhaustive judgments of the Judge President Sir Jacob Barry and Mr. Justice Shippard; the latter of whom referring to the case of Palmer v. Grand Junction Railway Co., 4 M. and W., p. 749, as to the sufficiency of proof of delivery to a passenger of a ticket containing conditions limiting liability without proof that such conditions were read over or explained to him, says that, "This last, however, is by no means a recent decision; and the whole question of constructive or presumptive notice in these cases bristles with difficulties; for how if the consignor, or passenger, or agent receiving the bill of lading or passage-ticket cannot read, or be blind, or too dim-sighted to decipher the notice, or be unacquainted with the language in which it is written, or too deaf to hear the explanation? Is he, or others through him, still affected by notice? Is it or is it not a sufficient answer to say, as in the present case, that a person having an opportunity of ascertaining the conditions, and either failing to do so, or making no objection or protest, must be deemed and taken in law to have tacitly acquiesced?" On these questions I entirely concur with the views of Lord Justice Mellish.

"The true answer in all such cases seems to be, that the Steamship Company is entitled to make some assumptions respecting the persons who take passage-tickets; as, for example, that he can read, that he understands the English language, and that in respect of engaging this passage he pays such attention to what he is about as may reasonably be expected from a person in such a transaction as that of taking a ticket for an ocean voyage."

I am therefore of opinion that even if the plaintiffs being foreigners to the English language, had got tickets, if the tickets were printed in English and were not explained to them, they were in no way bound by any conditions printed on them. But I am further of opinion that any contract that might have been eutered into between the Shipping Company and the plaintiffs, with which the document in question is sought to be connected was superseded or novated by the arrangement the ship's steward entered into with the plaintiffs shortly after they had started on

the voyage, by which, on the plaintiffs paying 30s. more to the ship's steward, they secured a second class cabin passage in place of the third class deck passage for which the so-called ticket was given at Delagoa Bay. Under this parole agreement (for no ticket was given for this 30s.) I maintain that the Shipping Company became common carriers as regards the plaintiffs, and that not under English common or Statute Law, as it affects carriers, but under our Roman Dutch Law, based on the Roman Civil Law, and it was then the place of the shipmaster as the carrier to have asked all questions of the passengers as to their luggage, if the carrier thought any questioning was necessary (see Parke B., Walker v. Johnson, 10 Meeson and Welsby, p. 169), and the case then as I have mentioned in the statement of grounds for my judgment (XIII. N.L. Reports pp. 78-85) would probably have come within those cases to which the late Chief Justice, Sir Henry Connor referred when he said in Reynolds v. Currie & Co. (N. L. Reports, March 31, 1875) "that he could understand something taking place in Natal waters connected with luggage which might have to be decided by Natal Law."



I am still therefore of opinion that the question between the parties here should have been decided by our law.

As to the 3rd ground of objection on which this appeal is founded, "that the ship was a gratuitous bailee for the plaintiffs." I have already said that I consider them more as spoliatores than gratuitous bailees, for the servants of the defendants not only prevented the plaintiffs from staying on board the ship on the night of their arrival (the 18th Sept. 1891), but would not even allow them to take the small box with money and valuables away with them that night; and when Mr. Zeeman, the clerk of Messrs. Bale & Wylie, the next morning accompanied the plaintiffs to the ship to get their boxes (the small one having been seen in a broken state in the cabin of which the steward had the key) they could not obtain either box, and for two months and a half afterwards they never saw them again until they were produced before the Magistrate on the 4th December, 1891.

Per curiam (TURNBULL, J., dissentiente): Referred to the Master to decide in favour of the appellant Company in respect of all money and all jewellery other than personal jewellery shipped by the respondents in fraud of clause 5 of the conditions printed on the back of the ticket, and

Castle Mail Packets Co. v Mitheram and also to find in favour of the appellant Company in respect of all articles in the large box marked V, other than the respondents' personal apparel.

> [Appellants' Attorney: W. E. Shepstone, Respondents' Attorneys: H. Bale & Wylie.]

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ROBERT JOHN HALL (Plaintiff) v. WILLIAM HODGSON (Defendant.)

Hall v. Hodgson.

Lungsickness. Damages, measure of. Counsel addressing the Court. Right of reply. Practice.

Defendant's cattle, being infected with lungsickness, verongfully came into contact with plaintiff's cattle and caused the latter to be infected.

HELD: That the liability in such a case was coextensive with that in cases of fraudulent misrepresentation and that the defendant was liable for the value of cattle so infected and dying of the disease, this being damage ensuing in the ordinary and natural course of events by reason of the interminaling of the cattle.

HELD, however, that claims for loss and damage by reason of the plaintiff being prevented from milking his cours and making butter, for loss of sales of cattle, and for reduced profits on sales actually made, were too remote and could not be sustained.

At a trial in banco, after counsel on both sides have addressed the Court, plaintiff's counsel has no right to reply on the facts, and can only do so by the indulgence of the Court.

(In banco),

The plaintiff and the defendant were both farmers. action was for £1,247 10s. Od., as damages by reason of defendant having wrongfully allowed cattle infected with Hall v. lungsickness to mix with plaintiff's cattle on the Weston Hodgson. Commonage and on plaintiff's farm. The items of the claim were as follows:—£147 10s. Od. for 12 head of cattle which had become infected by such contact and had died of the disease; £420, by reason of plaintiff having been prevented from milking 60 cows, by reason of the outbreak of disease and consequent inoculation; £350 by reason of plaintiff having been unable to dispose of cattle, and £240, the reduction in profit on cattle actually sold.

The defence set up contributory negligence, and averred that lungsickness was prevalent at the time among cattle running on land adjoining the Commonage other than those

belonging to defendant.

Greene, for plaintiff: The damages claimed are such as naturally flow from the wrongful act of the defendant. The necessary scienter has been proved (Cook v. Waring, 32 L.J. Exchq., 262; Earp v. Faulkner, 34 L.T., 284), Law 9, 1871, sec. 12, shows that the care taken by plaintiff in preventing the spread of disease should be taken into account

Escombe, for defendant, referred to the evidence as showing carelessness on the part of plaintiff, and the probability of the disease having been communicated otherwise than by the contact of defendant's cattle.

Greene sought to reply on the facts, citing Horsley v. Owen & Collier, 6 N.L.R., 28, and relying on the practice.

Escombe opposed, on the ground of a reply being only permissable on new points of law. (Rule 32, 1846).

GALLWEY, C.J.: You can only reply by permission of the Court.

(Our. adv. vult).

Postea: September 8th, (in banco).

The following judgment was delivered:—

GALLWEY, C.J.: This action was instituted to recover damages for loss and injury caused by defendant's negiligence in allowing his cattle when infected with lungsickness to be at large and intermingle with plaintiff's cattle, and thereby communicate that disease to plaintiff's cattle.

The plaintiff claims as damages £147 10s. for the loss of cattle which died from lungsickness; £420 damages by reason of not being able to milk his cows used to manufacture butter; £350 damages and loss by reason of his being

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Hall v. Holyson. obliged to innoculate his cattle, and being unable to dispose of same, 250 in number; £240 loss sustained on sale of 120 head of cattle owing to plaintiff's cattle being infected with lung-sickness.

The defendant had cattle grazing in the Weenen Thoms some 30 miles distant from Weston. He was aware that these cattle were infected with lungsickness. In disregard of the laws of the Colony prohibiting the removal of diseased cattle, he removed these infected herds from Weenen Thorns to Weston, over public roads, intervening farms and commonage, and on their arrival at his farm at Weston the defendant did not sufficiently herd at night or isolate his cattle, and thus did allow these lungsick cattle to stray on land other than such as was his property, knowing them to be affected with lungsickness.

The removal of the cattle for the purpose of innoculation, knowing them to be infected, was reprehensible and ungracious.

The defendant admits that in driving these cattle along the main road and over the commonage he was acting contrary to law, and that he was doing wrong.

The defendant's and plaintiff's cattle became intermingled

and were separated.

I do not think that plaintiff was as cautious as he should have been in herding his cattle. He permitted them to graze at night on the commonage which was not fenced off from lands on which lungsick cattle to his knowledge were

being depastured.

After carefully weighing and considering the evidence adduced, I have come to the conclusion that the defendant's cattle wrongfully came into neighbourhood and contact with plaintiff's cattle and caused the infection with which they were tainted to be communicated to plaintiff's cattle, and that 11 head of plaintiff's cattle therefrom and thereby died.

This action does not come under the provisions of the Lungsickness Law, which does not impose any greater liability than a vendor has in cases of fraudulent sales.

The liability resulting from a fraudulent sale is thus defined by *Pothier on Obligations*, Pt. I., c. 2 and 3, art. 8, p. 166., "If a person sells me a cow which he knows to be infected with a contagious distemper and conceals this disease from me, such concealment is a fraud on his part which renders him responsible for the damage which I suffer, not only in the particular cow which is the object of his original obligation, but also in my other cattle to which the distemper is communicated."

Pothier cites Digest p. 615.

The liability for remote damages is dealt with by the same author.

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The Digest Tit 15, thus defines the compensation to be paid, "If a vendor knowing that a beast has a disease sells it and does not inform the ignorant vendee, the vendor is liable to compensate the vendee for the loss which he has sustained from the purchase, including beasts which may have perished from contagion with the diseased beast."

Pothier treats of other damages, "If the loss of my cattle to which the disease has been communicated prevents me from cultivating my land, the damage appears to be a consequence, but it is a more remote loss—the question is whether the seller is responsible." "If the loss of my cattle prevented me from cultivating my lands, and thereby I was prevented from paying my debts and my creditors sold my goods at an undervalue, the latter loss is not necessarily a consequence of this fraud, but if I could have cultivated my land by the cattle that were lost in consequence of this fraud, this loss of property may therefore in some degree be taken into the account of the damage, but it ought to be left to the prudence of the Judge to use a certain degree of indulgence in estimate of damages."

Heineccius writes: "The opinion is quite true that the modern action in respect of damages to property or person does not depend on the lex aquilia, but on local law and

natural equity."

If the cattle infected by contagion and dying were required for a special purpose, say, for ploughing, or engaged in a special transport trip, then the loss of profit may form an item of damages, as the C. C. Court decided in Walkden v. N. G. R., 2 N.L.R., 226; on the principle that loss of benefit was adherent to the use of the cattle infected, and some compensation for the loss of profit may be given.

In actions in the English Courts for fraudulent representation where the defendant sold a cow and fraudulently represented that it was free from infection when he knew it was not, the plaintiff having placed the cow with five others, they caught the disease and died, the Court held plaintiff was entitled to recover the value of the five cows.

I allude to the case of Mason v. Mullett (1 C. P., 599), because damage was also claimed in that the plaintiff was compelled to sell other cows at a much lower price. No notice was taken of the claims by the jury or the Court.

The causa proxima and not the remote cause of damage is to be looked at, and whoever by an illegal act causes damage is answerable for all the consequences that ensue in the ordinary and natural course of events, but not for damage that does not follow from wrong. The death of other cows

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died.

Hall v. Hodgson.? which has resulted to plaintiff might naturally be expected to happen from the intermingling of cattle and was the natural consequence thereof from defendant's neglect.

This is the measure of damages generally adopted by

Courts in cases of fraudulent misrepresentation.

It seems to me that the Court should not extend the

liability in cases of damage arising from negligence.

I give judgment therefore for the plaintiff in the sum of £101 and costs, being his own value of the 11 cattle which

The plaintiff was not as cautious as he should have been, but in any case, there was no further damage to plaintiff's stock from the disease. He claims for loss of profits for milk and butter, and depreciation in value of his stock, and for loss in sales arising from fright of purchasers. I must refuse these items of damage.

WRAGG, J.: I have come to the same conclusion.

TURNBULL, J.: I concur in the judgment pronounced by His Lordship the Chief Justice.

Per curiam: Judgment for plaintiff for £101 and costs.

[Plaintiff's Attorneys: GREENE & CARMICHAEL. Defendant's Attorney: R. M. K. CHADWICK, Escourt.]

Sept. 8.

In re Anderson

In re Humphrey Evans Knight Anderson.

Attorney. Admission while serving articles. Practice.

A candidate Attorney will not be admitted as an Attorney during the currency of his articles.

(In banco).

Morcom, A.G., presented the petition of the above-named applicant for admission as an Attorney. It appeared that Mr. Anderson's articles were still current, and would not expire for some time to come; but it was represented that the practice had been to admit candidates under such circumstances.

The Court intimated that, in future, a candidate would not be admitted until out of his articles. This restriction, however, would not apply to existing articles.

Per curiam: The applicant admitted.

Umgombana (Appellant) v. Thomas Fleming (Respondent).

1892. Sept. 8.

Review. Practice. Remittal to Magistrate. Consent of Umgombana parties.

- The Court will not, on review, upon the mere consent of parties, remit a case to the Magistrate with a direction as to the law applicable.
- Where both parties agreed that the Magistrate's procedure had been wrong, the case sent back for rehearing, with leave to plaintiff to amend his claim, upon terms if required by the Magistrate. Costs of review reserved.

(In banco).

This was a review from the Upper Umkomanzi Magistracy. The plaintiff claimed £16 as double rent due by defendant under an agreement for the occupation of huts. The Acting Magistrate found for the plaintiff, for £12, without hearing evidence for the defendant who had asked for absolution from the instance. The defendant appealed, on the ground of such wrong procedure, and also that the agreement sued upon was not in compliance with Law 15, 1871, sec. 20.

Mason, for appellant, sought to put in a consent which included a prayer for a declaration by the Court that the contract was bad in law.

Tatham, for respondent, cited, as a precedent for the remittal now asked for, Robinson v. Wright, 3 May, 1888 (not reported).

GALLWEY, C.J.: That did not include a direction as to the law.

Wrage, J.: We might let the case go back to the Magistrate for rehearing, without any expression of opinion with reference to the law, with leave to the plaintiff to amend his claim—upon terms, should the Magistrate think fit to impose them.

Per curiam: Order accordingly. Costs of the review reserved.

[Appellants' Attorneys: Jackson & Holgate, Richmond. Respondent's Attorney: A. W. Cooper, Richmond.]



WILLIAM CHAMPION (Plaintiff) v. Annie Champion (Defendant).

Service of Summons. Evidence of identity of defendant.

A summons for restitution of conjugal rights was served upon defendant, in London, by a solicitor, whose affidavit of service declared that he had served the process "on the said A. C., of [the address followed] by showing to her the original summons with notice attached and by leaving with her a true copy thereof." Held: That this was insufficient, the defendant being, apparently, personally unknown to the solicitor, and there being no evidence that the person served was the defendant in the action.

(In banco).

Labistour, for plaintiff: The defendant was in default.

Upon summons being read, with a return of service as above indicated, the Court held that the service was not sufficiently proved, there being no evidence that the person served was the defendant mentioned in the summons.

Per curiam: To stand sine die, for further evidence of service.

[Plaintiff's Attorneys: DILLON & LABISTOUR.]

1892. Sept. 14. Watson v. Woodhouse. Frederick W. A. Watson (Appellant) v. Mary Ann Wood-House (Respondent).

Magistrate's Court. Claim in reconvention. Dismissal of summons. Practice. Review—Costs.

Dismissal of summons in convention does not dispose of claim in rectneetion.

Where a Magistrate, after hearing evidence in the action, had dismissed the summons without costs, declining to hear defendant's claim in reconvention—on review, this judgment corrected into an absolution of defendant from instance with costs, and the Magistrate directed to hear claim in reconvention: plaintiff to pay costs of review.



(In banco).

This was a review of the judgment of the City Magistrate, dismissing the summons in the action without costs.

Plaintiff claimed £50 as damage done to trees by a grass fire. Plea—tender of £10, and not indebted as to balance. Defendant claimed £50 in reconvention, for the wrongful construction of a dam upon his property.

After evidence had been heard for three days, the defendant's attorney pointed out that, whereas the summons was based on damage done to fruit trees, the evidence led had reference, almost entirely, to injury done to a shelterbelt, or "break wind" of trees. Upon this, the Magistrate dismissed the summons, without costs, and declined to hear the claim in reconvention, on the ground that it depended to a great extent upon the original summons, the dismissal of which closed the whole case.

The defendant appealed.

Bale, for appellant.

Tatham, for respondent.

GALLWEY, C.J. (after referring to the judgment of CONNOB, C.J., in Welborne v. Froomberg and Nathan, 5 N.L.R., 216): The practice in England is to regard the claim and counter-claim as independent actions (Shrapnell v. Laing, 20 Q.B.D., 538). I think that is the view taken by this Court, and the Magistrate was, therefore, wrong in his finding. The case must be remitted to the Magistrate, for him to hear the claim in reconvention, netwithstanding his dismissal of the summons, admitting the evidence already adduced by the plaintiff, and on record, with reference to such claim in reconvention; with liberty, however, to the plaintiff to call evidence in rebuttal. The respondent, plaintiff in the Court below, must bear the costs of this review.

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Watson v.
Woodhouse.

Weage, J.: I think that the Magistrate's dismissal of the summons, after hearing all the evidence for the plaintiff, was wrong. The proper order, at that stage, would have been an absolution of the defendant from the instance or a judgment for the defendant. But, in any case, such dismissal in no way relieved the Magistrate from the duty of hearing the defendant's claim in reconvention. The defendant has been compelled to come to this Court to get the Magistrate's order corrected, and, as he has succeeded, the respondent must pay the costs of the review proceedings as well as those in the Court below.

TURNBULL, J.: I am of the same opinion.

Per curiam: The Magistrate's judgment turned into an absolution of defendant from the instance, with costs. [The case remitted as indicated in the judgment of His Lordship the Chief Justice.]

[Appellant's Attorneys: Bale & Greene. Respondent's Attorneys: Laughton & Tathan.]

1892. Sept. 15 CHINIAN (Appellant) v. KUPUSAMY (Respondent).

Chinian v. Kupusamy.

Criminal Procedure. Magistrate's Court. Private Prosecution. Consent.

A right to a private prosecetion must be established and exercised as provided sec. 13, Ord. 18, 1845, and sec. 10, Law 25, 1890, and cannot be conferred by consent.

(In banco).

This was an appeal from the judgment of the Magistrate of Durban, under which the appellant had been sentenced to a month's imprisonment with hard labour, and ordered to pay the costs of the respondent, upon whose complaint the charge (one of assault) was preferred.

The Magistrate, in his reasons stated that on the starting of the case the defendant's attorney had agreed to the prosecution being taken as a private one, and that by consent of parties the case was then heard summarily, the title of the plaintiff on record being altered from "Regina" to "Kupusamy."

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Chinian v.
Kupusamy.

Greene, for appellant, cited Umxapo v. Regina (31st Oct. 1885, Verulam Circuit, not reported) as a case where an appeal from a conviction had been entertained after the appellant had served his term of imprisonment. [He was stopped by the Court.]

Mason, for respondent: The prosecution became a private one by consent of counsel. The Magistrate may have made a mistake, but the respondent should not suffer in consequence (Carter v. Alexander, 5 N.L.R., 288).

Gallwey, C.J.: The proceedings have been very irregular. How can consent give jurisdiction in a criminal case? The 13th section of Ordinance 18 of 1845 and Law 25, 1890, sec. 10, expressly declare the manner in which the right to a private prosecution may be established and exercised, and there are Rules of the Magistrate's Court (Nos. 10–12) which refer to such proceedings. These requirements have not been complied with, and the Magistrate's judgment was therefore wrong and must be set aside. [His Lordship referred to Levien v. The Queen, 1 M.P.C., 536.]

WRAGG, J.: This is a most distressing case. It is difficult to see why laws are to be made, if they are to be thus disregarded.

Per curiam: The Magistrate's judgment set aside.

[Appellant's Attorney: J. J. Hugman, Verulam. Respondent's Attorney's: DILLON & LABISTOUR.]

Nept. 15.

Vathagaree v.
Clerk of Peace

VATHAGAREE (Appellant) v. THE CLERK OF THE PEACE, DURBAN (Respondent).

Jurisdiction. Appeal from Circuit Court to Supreme Court in criminal cases.

There is no appeal to the Supreme Court from the judgment of a Circuit Court in a criminal case.

(In banco).

This was an appeal, by way of writ of review, from the judgment of TURNBULL, J., in the Durban Circuit Court, sustaining the judgment of the Magistrate of Durban under which the appellant was convicted of theft and sentenced to a term of imprisonment.

There were several grounds of review, which, however,

are not material to this report.

Bale (with him Farman) for appellant.

Morcom, A.G., for respondent, was not called upon.

GALLWEY, C.J.: There is no provision for an appeal from the judgment of a circuit court in a criminal case.

WRAGG, J.: There is only one way of bringing in review the judgment of a Circuit Court in a criminal case, and that is, when a case is tried by the Court itself with a jury, upon objections arising upon the indictment, as of record, in terms of the 39th Rule of Court. This appeal cannot be heard for want of jurisdiction.

Per curiam: The Court declines to entertain the application on account of want of jurisdiction.

[Appellant's Attorney: E. W. FARMAN.]

In re HERBERT HENRY JANION and THE VOTERS' LIST FOR THE KLIP RIVER ELECTORAL DISTRICT.

Sept. 15.

In re Janion.

Voters' Lists. Charter of 1856. Appeal.

The Supreme Court has no jurisdiction to entertain an application for an order restoring names to a Voters' List, unless the applicants have first, under secs. 33 and 34 of the Charter of 1856, brought their objections to such List to be heard and determined by the Resident Magistrate of the County or Electoral District.

(In banco).

This was an application by Herbert Henry Janion and others for an order restoring certain names to the Voters' List for the electoral District of Klip River, for the year ending the 31st August, 1893.

Janion, for applicants, contended that there had been insufficient notice under sec. 33 of the Charter of the time for hearing objections before the Magistrate. There had been a Proclamation on the 12th July fixing such time, but the Lists had not been published until the 26th July, the time for objections to be lodged expiring on the 5th August. The proclamation contemplated by sec. 33 of the Charter was one issued after the publication of the lists. The Supreme Court could review a Magistrate's proceedings even though he had in fact omitted to take any proceedings (Taylor v. Corporation of P.M.Burg, 3 N.L.R. (July), 34). Names can be ordered to be restored, even after a Burgess Roll has come into force (Roseveare v. Corporation of P.M.Burg, 2 N.L.R., 174).

GALLWEY, C.J.: You have not taken the steps required by the Charter. If you had taken your objection before the Magistrate on the 5th August, and your application had been refused, we might have given you relief. We are unable to entertain the application, which has been well and fairly argued.

WRAGG, J.: There seems to have been a sufficient notice of the time for lodging objections, and I do not think that it can rightly be contended that the Governor's Proclama-

1892. Sept. 15. In re Janion. tion, fixing such time, must of necessity be issued after the Voters' Lists have been published. We are unable to interfere, because the applicants have not adopted that procedure which alone would give us jurisdiction.

Per curiam: The Court, considering it has no jurisdiction to entertain the application, makes no order.

[Applicants' Attorneys: Janion & Robinson.]

1892. Sept. 15. In re THE UMZINTO SHIPPING COMPANY (in liquidation).

In re Umzinto Company. Shipping Co.

Company. Winding-up. Official Manager. Purchase of Assets.

Official Manager of a Company in liquidation authorised to purchase assets of the Company at public auction.

(In banco).

Mason moved on behalf of William Champion, one of the official managers of the above-named Company in liquidation, for leave to purchase the assets of the Company, or to resign his office. The applicant, being the largest shareholder in the Company, and also a creditor for £850, was desirous of protecting his own interests by bidding for the assets, and, if necessary, by purchasing the whole or a part thereof.

Per curiam: Leave granted to the applicant to bid in person at the sale of the assets by public auction, and to become a purchaser of the whole or any part thereof.

[Applicants' Attorneys: DILLON & LABISTOUR.]

CHARLES TAYLOR SANER (Petitioner) v. THE LOCAL ROAD BOARD FOR THE INANDA DIVISION (Respondent).

Jurisdiction—Judge in Inanda Road Board. Rule to show cause. Road Board. Chambers. Practice—who to begin. Powers of Board. Opening road.

- Semble: A petition under secs. 44 and 45, Law 36, 1888, for a rule to show cause, should be presented to the full Court, and not to a Judge in Chambers, although the latter may, under sec. 40, grant further time within which to appeal.
- Petitioner heard first in support of the rule (but see Holley v. Umgeni Road Board, 10 N.L.R., 141, and Leask v. Pellew, 11 N.L.R., 74).
- A Road Board, constituted under Law 36, 1888, has power to open a road, where needs or rights are shown to exist.
- Where it appears to the Court that a Road Board, after full consideration and personal inspection, has exercised a sound discretion as to the necessity for a road applied for, the Court will be slow to disturb the finding of the Board.

16th August. (In camera, before WRAGG, J.)

This was a petition for a rule to show cause why a decision of the Inanda Local Road Board should not be reviewed for the purpose of being corrected.

The Board found that a certain road applied for by Mr. G. Sinclair Smith was necessary to the requirements of the Blackburn Sugar Factory, and directed that such road should be opened as a by-road to the Blackburn estate.

The grounds of review were as follows:-

- (1) That whilst the application was for the re-opening of the road, the Board dealt with the application as being for the granting and laying off of a new by-road.
- (2) That prior to the alleged closing of the road, the applicant had no legal right to the use of such road.

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(3) That the road was not a by-road or right of way Aug. 14. (b) That the load was not a by-load of Sept. 14 220. within the meaning of sec. 30, Law 36, 1888.

Saner v. Inanda Road Board.

(4) That the applicant had acquiesced in the closing of the road.

The road in question was on the petitioner's (Mr. Saner's) land, and appeared to be a connecting way between the river Umhlanga and a public road from Blackburn to the Ottawa railway station. It was claimed that, in consequence of the road having been closed by petitioner's agent, the applicant before the Board (Mr. Smith) had to cart his sugar to Mount Edgecombe railway station, instead of to the nearer station at Ottawa.

Bale, for petitioner.

Per WRAGG, J.: Rule granted.

14 September, 1892. (In banco).

Wrage, J.: On looking into this matter, it appears to me to be very doubtful whether a single Judge sitting in Chambers has power under secs. 44 and 45 of the Road Board Law to grant a rule nisi. It was represented to me at the time that, unless a rule were granted in vacation, the matter could not be argued this term, and I granted the rule. But, as it is competent for a Judge in Chambers, under sec. 40, to allow an extension of the period within which to institute proceedings of appeal, such extension should have been applied for and thereafter, in term time, the full Court could have been moved for the rule nisi.

Bale, for petitioner, cited Law 11, 1877, and submitted that the schedule thereto did not except such an application from the jurisdiction of a Judge in Chambers.

Morcom, A.G., for respondent, raised no objection upon this ground.

Bale contended that the respondent should first show cause, and cited Leask v. Pellew and Holley v. Road Board (vide supra).

The Court, without expressing any decided opinion on this point, called upon Mr. Bale to argue the petitioner's case.

Bale, in support of the rule:—Every person has a right of access to a main road, but only by one way. A road to Sept. 14 & 20. more than one railway station is not a necessity. The convenience of the person whose land is traversed has to be Inanda Road considered, and compensation may be necessary. (Leask Board. v. Pellew, vide supra.

Postea: September 20, 1892 (in banco).

Bale, resuming, cited Grotius 2. 35. 8, and Schorer thereon; Van der Linden, 1. 11. 2; Van Leeuwen, 2. 21. 7; Voet, 2. 14. 34 and 8. 3. 4 and 9; Peacock v. Hodges, Buch. Rep., 1876, 65; Cadle v. Martens, 3 N.L.R. (March); 25 Leask v. Pellew—vide supra).

Morcom, A. G., showed cause:—A Board established under Law 36, 1888, is not bound by the strict provisions of the common law (Holley's case and Leask v. Pellew—vide supra). The Board, as the competent authority, took evidence, inspected the locality, and came to a proper decision.

GALLWEY, C.J.: I think that we are concluded by the two cases decided under this Law, in one of which the Court held, in a considered judgment, that a Road Board has power to open a road where either needs or rights exist—in other words, the powers conferred on the Board are such as could not be excercised by private individuals but only by the Government, including the right of ingress and egress to and from a farm. Objection has been taken to the use af the word "reopening" in the application, as for some time prior to the dispute the road in question had been used for the purposes of Mr. Saner's property, though, when he found it no longer necessary to him, he wished to [His Lordship then referred to the have it stopped. correspondence between the parties.] The road in question was not a by-road or right of way which is a servitude by deed, prescription, or dedication, but it was a way of necessity on the applicant's land for a necessary purpose in connection with his business.

In my opinion, therefor, the Board exercised a sound discretion in finding that a large central sugar-factory had need for the road. I have no doubt that the Board devoted a great deal of care and consideration to the matter, and they examined the locality personally. This Court ought to be slow to disturb the finding of a tribunal constituted by the legislature for deciding disputes between neighbours in a more expeditious and satisfactory manner than in a Court of law. I therefore think that the decision of the Board should not be set aside.

1892. Aug. 16. Sept. 14 & 20.

Saner v. Inanda Road Board. Wease, J.: I think that the application for the opening of this road might have been more precisely stated. Still, whatever little confusion may have been caused by this want of precision, there can be no doubt that Mr. Sinclair Smith, at the hearing of the application, distinctly claimed the road as a way of necessity, and that the Board, under powers conferred by sec. 33, Law 36, 1888, after taking evidence and inspecting the locality, came to the conclusion that Mr. Smith had so great a need for the road that it ought to be opened. I think that the Board has exercised a wise discretion, and that its finding should not be disturbed.

TURNBULL, J.: I am of the same opinion. The principal difficulty in the matter seems to have arisen from the use of the word "reopening," as that word is not used in the law; but this was in consequence of the road now opened by the Board having been in use before the application.

Per curiam: Application refused. Under the circumstances, no order as to costs.

[Petitioner's Attorneys: Shepstone, Wylie & Binns. Respondent's Attorney: J. J. Hugman.]

1892. Sept. 27.

Salisbury G. M. Co. v. Bank of Africa. THE SALISBURY GOLD MINING COMPANY, LIMITED, (Applicants) v. THE BANK OF AFRICA, LIMITED (Respondents).

Costs—taxation. Privy Council Appeal.

Solicitor's charges for preparing record in an appeal to the Privy Council, and for instructing London Agent in the matter, are not costs taxable in Natal against the unsuccessful appellant.

(In banco).

Bale, brought under review the Master's taxation of his bill of costs in the matter of the Bank of Africa v. Salisbury Gold Mining Company, Limited, in which judgment had been given for defendants and the plaintiff's appeal subsequently dismissed by the Privy Council (vide 11 N.L.R., 41 and 63, and 13 N.L.R., 94).

The Master had disallowed items for preparing_copy of record and précis of the case for Counsel in England, letters to London Agents therewith and thereon, copies of M.Co. v. Bank laws, perusing cases, and attending client thereon.

1892 Sept. 27. of Africa.

Bale submitted that the costs of a Solicitor in Natal preparing the appeal could not be taxed by the Privy Council Registrar, and should therefore have been allowed by the Master.

Morcom, A G., for the respondents: There was no obligation upon the respondent in the appeal to send the record to England, as the rules only provide for the transmission, by the Registrar, of a single copy. In the Privy Council Rules (13 June, 1853, secs. 2 and 4) private copying fees are disallowed. Instructions from the Solicitor in Natal to his Agents in London are clearly matters between Attorney and client.

[He was stopped by the Court.]

Wrage, J.: After a decision of the Supreme Court has been appealed from, how can there be costs in that Court?

GALLWEY, C. J.: I do not think that we should interfere with the Master's taxation, which was undoubtedly correct. The costs disallowed are beyond our jurisdiction, and, so far as I can see, were not necessary, though the work charged for was no doubt very useful. They are in any case payable by Mr. Bale's client.

WRAGG, J.: The ground I take is that these are not costs of the Supreme Court, and that, therefore, we have no jurisdiction to allow them.

TURNBULL, J.: I am of the same opinion. The costs are not chargeable as between party and party.

Per curiam: Application refused.

[Applicants' Attorneys: Bale & Greene. Respondents' Attorney: R. F. Morcom. Sept. 27.

Hosking v.
StandardBank

ORLANDO HOSKING (Applicant) v. THE STANDARD BANK OF SOUTH AFRICA (Respondent).

Privy Council Appeal. Time for presenting petition. Rule 2, of 19th July, 1870.

The application to the Supreme Court for leave to appeal to the Privy Council must be made within 14 days from the date of the judgment sought to be appealed from. It is not enough that the petition should be lodged with the Registrar within such time. Sundays cannot be excluded in computing the time for appealing. (Trubshawe v. Lipperts, 8 N.L.R., 201, followed).

Per Whagg, J., dissentiente; The date of filing the petition may be regarded as the date of applying to the Court. Trubshawe v. Lipperts distinguished, as there the Court had been sitting day by day within and after the fourteen days following judgment.

(In banco).

Bale, for the applicant, plaintiff in the action, moved for leave to appeal to the Privy Council from the judgment pronounced on the 2nd instant. The application had been set down for the 20th, upon notice dated and filed with the Registrar on the 15th. The Court only sat on the 3rd, 8th, 14th and 15th, 20th and 22nd.

Hathorn, for respondent: The application has not been made within 14 days.

Bale: Cases decided under the Cape Charter of Justice of 1832, sec. 50 of which enacts a rule in similar terms to that of the Privy Council (sec. 2), show that the application is in time. Holidays are not to be counted (Salmon v. Duncombe, 5 N.L.R., 137), nor days on which the Court is not sitting (Adler v. de Waal, 5 N.L.R., 305). The present date is the first day of the Court sitting after the expiration of the 14 days. In Trubshawe v. Lipperts (8 N.L.R., 201), the Court sat day by day. If the Court does not sit on the 14th day, the application may be made on the next day thereafter upon which the Court is sitting.

Wrage, J.: In Trubshawe's case (vide supra), I dissented from the Chief Justice's interpretation of the Rule, but, in the circumstances, as the Court had been sitting day by day, I agreed that the application should be refused. Nothing that I said at the hearing of that application would prevent me from now holding that the date of filing the petition may be regarded as the date of the application to the Court.

Sept. 27.

Hosking v. StandardBank

Postea, on the same day.

Wrage, J.: I am not concluded by the decision in Trubshave's case (vide supra), for the reasons which I have already stated. I am therefore disposed to think that this petition is in time. In Trubshave's case (vide supra), the appellant had been sleeping on his rights in an improper manner, and it was, I think, on that ground that Sir Henry Connor appeared to depart from the spirit of previous decisions. I see no reason why, for example, if a judgment has been delivered on the 28th or 29th of the month, and the petition for leave to appeal is filed with the Registrar on the 30th or 31st, the actual argument may not stand over until the following term, four or five weeks later.

GALLWEY, C.J.: The question is what is the meaning of the expression "apply to the said Supreme Court," in the 2nd section of the Order in Council of the 19th July, 1870? Is it enough if the petition be lodged within 14 days? The judgment in Trubshawe's case (vide supra) decided that the mere filing of the petition with the Registrar is not sufficient, and whatever may have been the arguments addressed to the Court on that occasion, that decision stands as the judgment of the full Court on that point. I suppose that the possibility of a petition being lodged and no further proceedings taken would have to be considered.

I had hoped to be able to exclude two Sundays, but I find that under Acts of Parliament containing the same limitation of time Sundays are not excluded, but that "within fourteen days" means "within fourteen consecutive days" (Reg. v. Justices of Middlesex, 7 Jur. Pt. 1, 396).

On these grounds, I feel bound to follow Trubshawe's case (vide supra), and to hold that the time for presenting a petition has expired.

TURNBULL, J.: I agree with His Lordship the Chief Justice as to the exclusion of Sundays. If all Rules for our guidance were as clear as the Rule now under consideration,

1892. Sept. 27. Hosking v. StandardBank there would be little trouble. It is plain that the application for leave to appeal has to be made to the Supreme Court within 14 days next after the judgment has been pronounced; and, following Trubshawe's case (vide supra), I must concur in refusing this application. It is not the filing of the petition, but the actual application before the Court, that has, if possible, to be made within 14 days; where this is impossible a remedy will always be found.

GALLWEY, C.J.: Of course this does not preclude the petitioner from taking his application direct to the Privy Council.

Per curiam: Application refused—costs reserved.

[Applicant's Attorneys: Bale & Greene. Respondents' Attorneys: Hathorn & Mason.]

Sept. 15 & 30.
Burton v.
Burton.

ELIZABETH AMY BURTON (Plaintiff) v. Shepherd Ray Burton (Defendant).

Divorce. Desertion. Prayer for restitution of conjugal rights. Practice. Pleading. Amendment.

In an action for divorce on the ground of desertion, the declaration must contain a prayer for restitution of conjugal rights. Where this had been omitted, amendment authorised and decree for restitution granted, with divorce in default of performance.

Sept. 15, 1892. (In banco).

Escombe, for plaintiff.

Defendant, in default, had been duly served with edictal citation.

GALLWEY, C.J. referred to Donlon v. Donlon (5 N.L.R., 102), as going to show that the declaration in an action for divorce on the ground of desertion must contain a prayer for restitution of conjugal rights, which was not asked for in the present action.

Per curiam: To stand to the last day of term for argument upon this point.

Sept. 30.
Burton v.
Burtont

Postea, Sept. 30, 1892. (In banco).

Escombe, for plaintiff, cited several cases decided in the Cape Courts, and submitted that although he was unable to claim the relief of divorce without an alternative decree for restitution of conjugal rights, yet as such a decree was really a judicial fiction, and as in the present case there had been desertion for 9 years which amounted to cruelty, the plaintiff having moreover asked her husband by letter to return to her, leave should be granted to amend the declaration by inserting a prayer for restitution.

Per curiam: Amendment authorised. Order for restitution in Natal within six weeks, failing which, decree granted for divorce.

[Plaintiff's Attorney: HARRY ESCOMBE.]

Frederick Ludwig Kruger (Appellant) v. WILLIAM HORNER (Respondent).

1892. Sept. 30.

Kruger v. Horner.

Magistrate's Court. Jurisdiction. Question of right of way. "Rights in future." (Law 22, 1889, sec. 21.)

An action involving a disputed right of way is beyond a Magistrate's jurisdiction, as binding rights in future (Law 22, 1889, sec. 21.)

(In banco).

In this case, the plaintiff sued in a Magistrate's Court for delivery of a pig wrongfully seized and detained by defendant, or its value, and also for damages in respect of such seizure. The summons averred that while plaintiff was driving 13 pigs upon a certain road leading over defendant's property or over land contiguous thereto, the defendant forcibly seized the pigs and detained same, subsequently returning twelve pigs only. That plaintiff "had used such road for a period of 18 months without let or hindrance from defendant."

Sept. 30. Kruger z. Horner. The Magistrate found for the plaintiff. The defendant appealed.

Greene, for appellant: The Magistrate had no jurisdiction. A servitude such as the use of a canal is of the character of immovable property (Steel v. Thompson 8 M.P.C., 280).

[He was stopped by the Court.]

W. Burne, for respondent.

Wrage, J.: To my mind, the summons, upon which this action has been brought, is one by which future rights are sought to be bound. Such an action is expressly excepted, by the 21st section of the Inferior Courts Law, from a Magistrate's jurisdiction. The decision in this case was therefore wrong, and must be set aside.

GALLWEY, C. J.: The question of a right of way was raised in the summons, and that ousted the Magistrate's jurisdiction. I say nothing as to who had the right of way.

TURNBULL, J.: I am not sure that the second count of the summons raises a question of right of way. I concur, however, in setting aside the Magistrate's judgment.

Per curiam: It appearing to the Court that the Magistrate had no jurisdiction to try the action, which in volved a question of right of way, the Magistrate's judgment set aside and corrected into a judgment for the defendant with costs of review and of the Court below.

[Appellant's Attorneys; Livingston & Hitchi≯s. Respondent's Attorney: G. M. Burne.]

GOTTFRIED SCHULZE (Applicant) v. CATO RIDGE SCHOOL COMMITTEE (Respondents).

Execution. Judgment for defendant with costs, upon verdict Ridge School Action by several plaintiffs suing as Committee. of jury. Execution for Costs. Sheriff's return. Joint and several liability. Jurisdiction.

Schulze v. Cato Committee.

- C. and others, in their capacity as a School Committee, sued S. for possession of school premises and furniture. jury found for defendant and judgment followed accordingly, with costs. S. issued execution for his costs. The Shertff's return did not show that property of the committee had been levied upon. There was evidence of the existence of such property.
- HELD, in these circumstances, that an application for leave to issue execution against the individual property of the plaintiffs should be refused.
- QUERE: Whether such an application could be decided upon motion?
- WRAGG, J., dubitante, whether, even upon an action, the order of the presiding Judge in a jury case as to costs could be so varied.

(In banco).

Bale moved for an order authorising execution against the respondents, for the attachment of their individual property and a declaration of their joint and several liability. He contended that the plaintiffs in the action were at fault in setting the law in motion, having had no authority to bring the action, and that they were liable individually as consortes litis (Holmes v. Odfellows, 4 N.L.R., 56; Winter v. Parker Wood & Co., 6 N.L.R., 204; Theunissen v. Fleischer and others, 3 Buch. E.D.R., 191; De Blanche v. Zietsman, 1 N.L.R., 185; Tomlin's case, N.L.R., 1867, p. 127; Voet 3.4.4,3.3.13; Registrar of Deeds v. Victoria Club, 2 N.L.R., 231; Myburgh v. The Sequestrator, 1 Menz., 345. The last-cited case was as to costs being awarded by motion subsequent to the trial). [GALLWEY, C.J.: The respondents did not execute the Power of Attorney to sue, which is executed by the Chairman and Secretary only.]



respondents' names are in the summons and the declaration, and they appear in this application. [Wragg, J.: But the fact that you have to go back and explain all these matters to this Court shows that the application is not one to be decided upon a mere motion. The facts are within my own knowledge, as I was the presiding Judge at the jury trial, and if Mr. Lister had asked at the trial for a jugdment for costs against the plaintiffs individually, I should have refused it.]

Laughton, for respondents: The question of the costs is res judicata, judgment having gone against plaintiffs in their official capacity and execution issued accordingly. The defendant should have obtained security for his costs (Durban Assurance, &c., Co. v. Raw, 10 N.L.R., 64; Archbold's Practice (13th Ed.) p. 1,142; Voet 2.4.37; Ex. of Blamyre v. Milner and Wirsing, N.L.R. 1869, p. 99; Harding's trustees v. Winter, 5 N.L.R., 199; as to the absence of remedy on motion Mackenzie v. Lion's River Road Board (not reported—1887); Cato v. Aldridge, N.L.R., 1868, 256; Kinchant's case, 2 N.L.R., 195). There has been no levy on the goods of the Committee.

Bale, in reply, cited Anglo-Danubian Co. v. Robinson, 10 Jur. N.S., 87.

GALLWEY, C.J.: There are several obstacles in the way of complying with this application, and, under the circumstances of the Sheriff's return, we think the order should be to refuse the application, without prejudice to any further proceedings which the defendant may be advised to take.

WRAGG, J.: In refusing this application, I think it is sufficient to say that there is property belonging to the Committee which has not been levied upon.

It is a more serious question whether, upon a motion, an order made by the Judge upon the verdict of a jury can be altered. Even by means of an action, it is, I think, doubtful whether such an order, made by the presiding Judge, can be varied by another Court; is not the matter res judicata?

TURNBULL, J.: I concur. Costs were given at the trial against 5 plaintiffs as committeemen, and a sixth as Secretary. We find a singular return from the Sheriff showing that three of the parties deny liability; another whose wife

is inclined to admit liability; and two who do not deny it. But there is nothing to show whether there were any goods to levy upon, or whether any such levy was made. The application should be refused, without prejudice to anything that may be done in future.

Schulze v. Cato Ridge School

Counsel were heard as to costs.

Per curiam: The application refused, without prejudice to any further proceedings which the defendant may be advised to take. The respondents granted the costs of this application.

[Applicant's Attorney: A. LISTER. Respondents' Attorneys: LAUGHTON & TATHAM.]

King & Sons (Appellants) v. John T. B. MACAULAY (Respondent).

Matter at King & Sons Appeal from Circuit Court to Supreme Court. issue under £20. Leave to appeal (secs. 40 and 45, Law 10, 1857). Practice.

Liability for unreasonable delay in delivery. Carrier. Ship. Damages.

- 1. In an appeal from the judgment of a Circuit Court in a review from a Magistrate's Court, the sum or matter at issue being under £20, an allowance of the appeal by the Circuit Judge is necessary. But when such allowance cannot be given during the Circuit, the appeal may be subsequently allowed by the Circuit Judge, even after the case has been brought before the full Court, on application made during the adjournment of the hearing.
- 2. Costs are not to be reckoned, in determining whether the matter at issue is under £20, for purposes of appeal.
- 3. A carrier is not liable for the full value of goods late delivered where there has been no unreasonable delay amount-

1892, Sept. 30. Oct. 1 & 3. King & Sons v. Macaulay. ing to a constructive total loss. A consignee is not entitled to abandon and sue as for a total loss because of a few days' delay in delivery, which would have occasioned no damage if delivery had been accepted when tendered. (Hess v. Union S. S. Co., N. L. R., 1875, p. 15, distinguished).

[Per Turnbull, J., dissentiente: Where goods were not landed until 16 days after arrival, although the whole cargo should have been discharged in 8 days at the most, the goods having been kept on board for 4 days in order to "tilt" the ship for repairs, this may be regarded as unreasonable delay entitling consignes to abandon and sue for the value of the goods, within the rule laid down in Hess's case (vide supra) there being some evidence consistent with the theory that the goods had deteriorated in value.]

(In banco). 30th September, 1892.

This appeal was from the judgment of Turnbull, J., at the Durban August Circuit, on a review from the Assistant Magistrate of Durban, who had found for the plaintiff (now respondent) for the value of 2,380 cocoa nuts at seven shillings (7s.) per 100, with costs, the judgment of the Judge upholding the Magistrate's decision.

The facts, so far as material to this report, were in substance as follows:—

The respondent, Macaulay, was the holder of a bill of lading of 34 bags of cocoa nuts shipped in the s.s. "Limpopo," from Inhambane, and stowed in the fore part of the ship, under some timber. The vessel arrived at Port Natal and entered the inner harbour on the 25th January, 1892. Consignee's agent passed entry on the 28th and asked for delivery on the 29th, when he was informed that the nuts could not be given up as the ship was being "tilted" in order to raise the stern for repairs to the machinery. He expressed himself "perfectly satisfied." There were other requests for delivery between the 2nd and 8th February, and on the latter date, demand was made for £17 17s. 3d., the full value of the nuts at 15s. per 100.

It appeared that on the arrival of the ship, consigned was offered 12s. per 100 for the cocoa nuts, and, on the 7th

February, there was an offer at 8s. per 100 for sound nuts and an arrangement as to those without milk. Purchasers would have taken the consignment, at this price, on the King & Sons 11th February and subsequently; but the consignee, having v. Macaulay. on the 8th February abandoned the nuts to the appellants, did not consider himself in a position to sell.

The cocoanuts were, apparently, landed on the 10th or 11th February, and delivery then was tendered to consignee's agent, but refused under instructions from his principal.

The Magistrate held that there had not been reasonable dispatch in discharging the cargo, which had been kept on board for the convenience of the ship, and gave judgment for plaintiff at the rate of 7s. per 100 cocoa nuts.

This judgment having been brought in review before the Durban Circuit Court, was sustained by TURNBULL, J., on the ground that there had been undue delay in discharging the cargo which ought to have been effected within 8 days but occupied 16 days, owing, in part, to the timber lying over the cocoa nuts in the forehold having been kept for 4 days on board for the purpose of certain repairs. learned Judge held that the case came within the rule laid down in Hess's case (vide supra) and Raphael v. Pickford (12 C.P., N.S., 178), the delay in delivery being tantamount to no delivery at all, and so entitling the plaintiff to abandon the nuts and sue for their full value.

The defendants (King & Sons) appealed on the following material grounds.

(1) Plaintiff had no right to abandon on the 8th February, his remedy being for actual loss or damage. Delay in delivery for a few days gave no right to abandon. (3) There was no unreasonable delay, nor any damage sustained. (4) Tender of delivery on 10th February and offer of sale open on the 11th February. (5) No evidence of damage, the cocoa-nuts not being perishable.

W. Burne, for respondent, pointed out that the judgment was in a matter at issue under £20, and that no leave to appeal had been obtained (Law 10, 1857, secs. 40 and 45; Rush \forall . Emanuel, 7 N.L.R., 68).

Labistour, for appellants: The section cited do not apply to a case heard on review from a Magistrate's Court, which comes within the 27th section, but only to a "trial." The costs of the Magistrate's Court brought the matter at issue Sept. 39. Oct. 1 & 3. King & Sons v. Macaulay. to over £20. It was impossible to obtain the Judge's leave to appeal until after the sessions, judgment having been reserved.

GALLWEY, C.J.: It has been well settled, in cases under the Privy Council Rules, which also contain the words "matter at issue," that costs are not to be reckoned in ascertaining the appealable amount. I suppose the Circuit Judge can still give leave to appeal.

[An order allowing the appeal was obtained at the rising of the Court, from TURNBULL, J., in camera.]

Postea. October 1 and 3. (in banco.)

Labistour, for appellants, argued the several grounds of appeal, and cited "The Parana," (2 Prob., Div. 105.)

W. Burne, for respondent, contended that there had been such unreasonable delay as to entitle consignee to sue for the value of the goods (Hess's case, vide supra). There was a constructive total loss on the 8th February, as the consignee did not then know how long the delay might be, and he is not to go back on his abandonment because the goods were afterwards available.

WRAGG, J.: The case of Hess v. Union S. S. Co. (vide supra) appears to me to be easily distinguishable from the present case. It is quite clear, so far as Mr. Justice Phillip's judgment is concerned, that in Hess's case there were circumstances occasioning a constructive total loss. The guns ought to have arrived at Durban or Delagoa Bay for the supply of a market which, in the month of May, is at its height at the latter place. The guns were seized at Port Elizabeth by the Custom House authorities and they had not been delivered to the plaintiff on the 18th of July. The plaintiff, having lost his particular market, and eventual delivery being doubtful, treated the seizure and detention as a total loss and brought his action for and recovered the full value of the guns. Here, however, there is nothing more than a few days' delay, chiefly owing to the steamer having to be "tilted," and, almost immediately afterwards, the cocoanuts were actually tendered to the consignee, who then had an offer for their purchase which was repeated the following day, the 11th February, and confirmed long afterwards, on the 14th March, at the same price. To say, under these circumstances, that there was a constructive total loss is absurd. At the most there was nothing more than a technical default on the part of the ship, which should have been overlooked. So far as plaintiff's agent was concerned, King & Sons he seems to have been "perfectly satisfied," but the plaintiff took upon himself to abandon the cocoanuts and to sue for their value as if there had been a total loss. There ought surely to be give and take in such matters, and it would have been better if the plaintiff had acted with more prudence and patience. When he knew that the offer of the 10th February held good, as a reasonable man he should have inspected the cocoanuts and should have accepted them if they were in good condition. The case ought never to have come into a Court of law.

On these grounds, I am of opinion that the judgment of the Circuit Court should be set aside.

GALLWEY, C.J.: It is a matter for regret that this action was ever instituted. [His Lordship referred to the facts]. It seems to me, with all respect to the learned Judge who heard the review, to be trifling with justice to say, under these circumstances, that there was a constructive total loss justifying the abandonment of the cocoa-nuts and a judgment for their full value. The nuts were sold for 8/- per 100, but the action was brought for twice that amount, and I do not think that such attempts should be favourably regarded by the Court. The Magistrate would have acted rightly if he had dismissed the case with costs.

TURNBULL, J.: I arrived at the same conclusion as the learned Magistrate, who was guided by the decision in Hess v. Union S. S. Co. (vide supra). The question really is— Was there or was there not unreasonable delay in delivering the cocoanuts to the consignee. The steamer arrived on the 25th January, and the goods were not on the wharf until the 10th or 11th February—a period of at least 16 days. It is shown by the evidence that the ship was of 800 or 900 tons register and should have been discharged in 8 days at the furthest, whereas she was nearly if not fully twice as long in discharging cargo as she should have been. The delay arose almost entirely from work being done for facilitating the economical carrying out of repairs to the ship and for the convenience of the ship owners. Under these circumstances, I cannot but regard the delay as unreasonable and unjustifiable, and as coming within the decision in Hess's case (vide supra). [His Lordship cited several passages from the judgments in that case.]

My learned colleague, Sir Walter Wragg, lays stress upon what Mr. Justice Phillips said in his judgment in 1692. Sept. 33. Oct. 1 & 3.

King & Sons

Hess's case; but under the circumstances of that case the detention was clearly equivalent to an actual total loss; and I read his judgment as agreeing with Sir Henry Connor, C.J., that even where the surrounding circumstances were not so strongly marked, a consignee could, upon an unreasonable and unjustifiable delay on the part of a carrier, refuse to receive his goods, treat the detention as a total loss, and recover their full value from the carrier.

As to whether the cocoa-nuts are or are not damaged, there is not much evidence, but what there is is consistent

with the theory that they have deteriorated.

For these reasons, I am unable to concur with the rest of the Court.

Per curiam: The judgment of the Circuit Court set aside and converted into a judgment for the defendants, now appellants. Each party to bear his costs of the action in the Magistrate's Court. The respondent to pay the costs of this appeal and of the review in the Durban Circuit Court.

[Appellants' Attorneys: GOODRICKE & Son. Respondents' Attorney: W. BURNE.]

NATAL LAW REPORTS

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NOVEMBER, 1892.

In re THE NEW HERIOT GOLD MINING COMPANY (LIMITED).

1892. Nov. 2.

License and Stamp Law, 1885. Spoiled Stamps. Juris-Inre The New diction. Appeal from Distributor of Stamps.

The Supreme Court has no jurisdiction to entertain an application for an order on the Distributor of Stamps to refund the price of used stamps or to exchange new stamps for spoiled stamps, unless the procedure contemplated by sec. 31 of the License and Stamp Law, 1885, requiring proof to be given to the Distributor of Stamps, has first been followed. [Gallwey, C. J., dubitante whether in any case there could be an appeal from the Distributor of Stamps save as specially provided in the License and Stamp Law, 1885, sec. 32, and Law 20, 1885, sec. 3.]

(In banco) before GALLWEY, C.J., and TURNBULL, J.

This was an application on behalf of the above-named Company for an order directing the Distributor of Stamps to refund certain moneys paid for stamps affixed to the original issue of the Company's scrip, or to exchange such used stamps for new ones. It appeared that certificates of the shares allotted to absent shareholders were at first made out in the Secretary's name, and, after being duly stamped in accordance with Schedule A, Law 51, 1887, and the stamps cancelled, were sent to the London Secretary for transfer. Shortly afterwards, it was decided to issue certificates to shareholders in Europe direct from the London Office, and the original certificates were accordingly called in, not having been issued.

Nov. 2.

Nov. 2.

The Distributor of Stamps, on application made to him. declined to exchange new stamps for those attached to the Heriot G. M. Sec. 31 of Law 38, 1884, had been taken.

Bale, for applicant.

Morcom, A.G., for the Distributor of Stamps.

GALLWEY, C.J.: The 32nd section of Law 38, 1884, and the 3rd section of Law 20, 1885, confer special jurisdiction as to appeals from the Distributor of Stamps. I do not think we have any jurisdiction otherwise in such matters. But, in any case, even if there be an appeal, we cannot entertain the present application, as it does not appear that the documents have been submitted to the Distributor of Stamps, nor that proof has been adduced as required by sec. 31 of the License and Stamp Law, 1885.

Per curiam: It appearing to the Court that it had no jurisdiction to entertain the application in the manner and form in which it had been brought before the Court, the application refused.

[Applicant's Attorneys: Bale & Greene.]

18£2. Nov. 3. In re THE STILL'S COLLIEBY COMPANY, LIMITED.

In re Saill's Colliery Co., (Ld.)

Company. Winding-up. Proposal for voluntary liquidation. Application by Court of sec. 10 of the Winding-up Law of 1866.

- The Articles of Association of a limited Joint Stock Company provided for voluntary liquidation by resolution of the shareholders. A petition for the winding-up of the Company having been set down for hearing, the Directors issued a notice to shareholders calling a special meeting in terms of the articles of association to decide as to voluntary liquidation.
- At the hearing of the petition (which was opposed) the Court, under the powers conferred by sec. 10 of the Winding-up Law of 1866, directed the special meeting to be duly held as summoned.

(In banco) before GALLWEY, C.J. and TURNBULL, J.

1892. Nov. 3.

In re Still's Colliery Co., (Ld.)

Bale, on behalf of a contributory of the above-named Company, presented a petition for winding up, the grounds being those specified in sub-secs. 7 and 11 of sec. 5 of Law 19, 1866. He argued that the provisions in the articles of association as to voluntary liquidation did not take away the right of a creditor or contributory to petition the Court, and cited Lindley on the Companies Acts, 5th Ed. p. 630, et seq.; The German Date Coffee Co. (20 Chan. Div., 151); The Haven G. M. Co. (ibid, 169).

[It appeared that the petitioners were willing that the meeting of shareholders to decide upon voluntary sequestion should be held, and that the application should stand over until after such meeting, which, they feared, might

after all prove ineffectual.]

Hathorn, for certain shareholders, opposed, and represented that the shareholders generally, by a large majority, were in favour of voluntary liquidation. [He also referred to the grounds of the petition, which, however, are not material to this report.]

GALLWEY, C.J.: It appears to me that the 10th section of the Winding-up Law of 1866 was designed to meet such a case as this. It empowers the court hearing the petition "before making any order absolute, to direct the application or performance, either wholly or in part, of any provisions contained in or supplied by the constitution of the Company towards the purposes of such winding-up, or towards considering or ascertaining the necessity or expediency of such winding-up." We will direct that the meeting already summoned be held for the purpose of deciding whether the Company shall be wound up in terms of the articles of Association or not. Our law makes no special provision for voluntary winding-up, and it should be borne in mind that there does not appear to have been any contemplation of voluntary liquidation until the petition set the parties in motion.

Per curiam: Order accordingly. Costs reserved.

[Applicant's Attorneys: LAUGHTON & TATHAM.]

Nov. 3.

Mangena v.

Mallandain.

Mangena (Applicant) v. WILLIAM A. MALLANDAIN (Respondent).

Interdict. Application to set aside. Purchase and sale of land. Act of mandatory. Alleged mistake.

W. M. obtained an interdict against registration of any cession or document alienating a certain piece of land, on the ground that it had already been sold to him by M., the holder of certificate of sale, and that the latter was endeavouring to cede his interest to a third party. Upon application by M. for removal of the interdict, on the ground that M's agent, in effecting a sale to W. M., had exceeded his authority, and that M. had in fact sold the land to another person.) Held: That in these circumstances, the Court could not, upon a motion, disturb the interdict, but that W. M. should be put upon terms to bring an action to establish his rights.

(In banco) before GALLWEY, C.J., and TURNBULL, J.

Janion, for applicant, moved for dissolution of an interdict granted, under the circumstances above indicated, by Wrag, J. on the 28th September, 1892. He argued that, in any action for specific performance, a written contract would be necessary under Law 12, 1884, and that it would have to be shown that the applicant, Mangena, knew what he was signing when he executed the power of attorney which he believed to be an authority for his agent to sell the land, but not a power to transfer to the respondent.

Hathorn, for respondent, read answering affidavits, to the effect that an agreement of sale had been concluded by him with Mangena's agent, to whom he had paid £50 on account of the purchase price.

GALLWEY, C.J.: It is impossible for us to decide this case upon the present motion. The respondent has obtained an interdict, and there is nothing before us to justify an order setting it aside. Let the respondent bring his action. Summons must be issued before the last day of term, costs to be costs in the cause.

Per curiam: Order accordingly.

[Applicant's Attorneys: Janion & Robinson. Respondent's Attorneys: Hathorn & Mason.]

- Criminal Procedure. Preparatory examination. Access of Regins v. Nomcabs and legal adviser. Ordinance 18, 1845, secs. 43 and 44. others.

 Law 16, 1861, sec. 4.
- Under the second proviso to sec. 4, Law 16, 1861, a Resident Magistrate has power to refuse permission to the legal adviser of a prisoner under examination to be present at such examination, if it appear to such Magistrate that the ends of justice will be best answered by so doing.
- The Supreme Court will not interfere by way of interdict to stay the proceedings of a preparatory examination in a criminal case, where the Magistrate has exercised the discretion so conferred upon him.
- [Per Turnbull, J. (dissentiente): The word "person" in the second provise to sec. 4, Law 16, 1861, does not include the "legal adviser," but refers only to the general public. A prisoner has an absolute right to the access of his legal adviser at all reasonable times.]

(In banco).

This was an application, on behalf of Nomcaba and other natives in custody in the gaol of Lower Umzimkulu Division on a charge of murder, for an order setting aside an interdict granted on an ex parte application, by Turnbull, J., in chambers, on the 26th October, 1892, restraining the Resident Magistrate, Lower Umzimkulu, from proceeding with the preliminary examination of witnesses in the case, in the absence of the legal adviser of the prisoners, unless the said Magistrate should show cause to the contrary on or before the 3rd November.

The matter stood over from the 3rd November for hearing before the full Bench.

Morcom, A.G., for the Magistrate, showed cause: The jurisdiction of the Judge was ousted by Ordinance 18, 1845 (secs. 5-7), which places the control of the prosecution of criminal offences in the hands of the Attorney-General, who ought, at least, to have received notice of such an application. Sec. 43 of the same Ordinance shows the distinction between a prisoner when under examination and

1892. Nov. 12. Regina v.

others.

after committal for trial. Sec. 44 shows that a prisoner under examination has no right at that stage to the assistance of a legal adviser. Law 16, 1861, sec. 4, allows a Nomcaba and prisoner under these circumstances to have the access of a legal adviser, unless it shall appear to the Magistrate that the ends of justice will be best answered by refusing such access, in which case the Magistrate may order that no person shall have access to, or be, or remain in the room or building in which the examination is proceeding, such room or building not being deemed an open Court for that pur-The person who claimed such access, a law agent, was not the "legal adviser" of the prisoners, who had retained counsel in Maritzburg. Injunctions or interdicts are only granted in civil matters (Story's Eq. Jurisp., sec. 893; Inst. 4.15). Courts of equity will not stay proceedings in criminal cases (Mayor, &c., of New York v. Pilkington, 2 Atk. Rep., 302; Saull v. Browne, 10 Chan. App., 64; Kerr v. Corporation of Preston, 6 Chan. Div., 463). Still less will a common law Court interfere.

> Laughton, in support of the interdict: Law 10, 1857, sec. 27, gives the Supreme Court power "to exercise full supervision and control over all Magistrates, and, if necessary, to set aside or correct their proceedings." This jurisdiction is not ousted by the provisions of Ordinance 18, 1845, secs. 43 and 44, which have been supplemented by Law 16, 1861. Sec. 4 of the latter law gives right of access of a legal adviser to a prisoner under examination, without reference to the Magistrate. The word "person" in the latter part of that section does not include a legal adviser. The Magistrate is bound to exercise his discretion rightly. A law agent is accepted in Magistrate's courts as a legal [GALLWEY, C.J.: Can you cite any authority to show that this Court will interfere by interdict with criminal proceedings in a preparatory examination? does the power of this Court to correct such proceedings begin and end? Law 10, 1857, sec. 27, gives power to the Supreme Court to correct erroneous proceedings, though not perhaps to stay proceedings properly taken. J.: I am sure that no single instance of such an interference with criminal proceedings can be cited.] Prohibitory clauses in a statute must be construed strictly (Arnaud v. Durban Corporation, 2 N.L.R., 66; Roseveare v. P.M.Burg Corporation, 2 N.L.R., 174; Roberts v. Durban Corporation, ibid, 206; Looker v. Halton, 4 Bing., 188).

> WRAGG, J.: Under sec. 44, Ordinance 18, 1845, no prisoner was of right entitled to the assistance of a legal

adviser while under preparatory examination. That was corrected by sec. 4, Law 16, 1861, which provides that every prisoner under committal for examination, or for Regina v. trial, shall be allowed the access of a legal adviser. There others, are, however, two provisoes in that section, and it is evident that they do not refer to a prisoner already committed for trial, but to an accused person under preparatory examination. The room or building, wherein the Magistrate or Justice may take such examination, is not to be deemed an open court. That is in the first proviso. second proviso empowers the Magistrate or Justice to direct that no person shall have access to, or be, or remain, in such room or building, if it appear to him that the ends of justice will be best answered by such order.

1892. Nov. 12. others.

It is, therefore, clear to me that, as to a prisoner under preparatory examination, it was intended that the Magistrate or Justice should have a discretion, though not so in the case of a final trial before him. The Magistrate may, in his discretion, say that the ends of justice will be best answered by the exclusion of all persons, not present with his permission, and may order their exclusion accordingly.

In the present case, the Magistrate, in his discretion, told Mr. Hodson that the room must be a private one, and that he could not, in the interests of justice, allow any person to be present therein. The question is—ought this Court to interfere, and so to cripple the administration of justice, by interdicting the Magistrate from proceeding with the examination in the absence of the prisoners' legal adviser? There can be no real hardship, as the law, in giving to the Attorney-General full control of such matters, has provided a safety-valve. The Attorney-General will take care that the prisoners are not placed under undue restrictions, and it would have been better, where the proceedings of a public department were concerned, that notice of the application should have been given to the head of that department, the examination being allowed to proceed, leaving the Attorney-General to interfere or not as he might think best. It is a serious thing to cripple the administration of justice by an order staying all preparatory proceedings, and I am of opinion that the interdict should be set aside.

GALLWEY, C.J.: I desire to say that I have searched in every book treating of Roman Dutch Law to which I have access, and have also referred to the Privy Council appeals in criminal cases and to other authorities dealing with the powers of civil courts to stay criminal proceedings. I find 1892. Nov. 12. Regina v. Nomcaba and others.

in Story's Equity Jurisprudence (sec. 893) that one of the excepted cases in which the Courts of Equity will not interfere by interdict is that of proceedings in any criminal matters. Exactly the same doctrine is laid down in Joyce on Injunctions. No authorities to the contrary have been cited before me, and I must certainly decline to interfere with the preparatory examination in this case. If there be any hardship, it is for the legislature to remove it. law intends that every prisoner under examination shall of right be entitled to the access of his legal adviser, be it so, but such has never been the practice in this Colony. The Attorney-General has certain powers in reference to magisterial proceedings, one in particular-and a very extensive power-of ordering rearrest, and although, while I was Attorney-General, I never applied to exercise such a power, yet if I had found the Magistrate going wrong I should have thought it my duty to do so.

Law 16, 1861, was passed to give greater rights and advantages to accused persons, but, in enacting the provisoes to sec. 4, the legislature evidently intended to leave a discretion to the Magistrate in certain cases, and this Court should no more interfere in such proceedings than it would endeavour to control the Attorney-General's right of prosecution. This Court is not to restrain the administration of criminal justice, but rather to assist it, and we cannot apply to the present case principles unknown to any system of jurisprudence. The concluding portion of the section corresponds with the 11th and 12th Vic., c. 43, sec. 19.

TURNBULL, J.: I will state the reasons which prompted me to grant this interdict.

Since the passing of Law 16, 1861, a prisoner has, in my judgment, the absolute right, at any reasonable time, to the access of his legal adviser, for the law enacts as follows: "From and after the taking effect of this law, any prisoner under committal for examination, or for trial, shall be allowed the access of a legal adviser": and when, I ask, would that access be more valuable to him than during the preparatory examination, when, whether he be represented by counsel or by a law agent, his interests may be duly protected? I also may here state that I am of opinion that a law agent, if approved and licensed by the Magistrate, is, under sec. 60, Law 22, 1889, entitled to appear in both criminal and civil cases coming before that Magistrate. The absence of such assistance at a preliminary examination may cause irreparable injury to the prisoner,

to whom legal assistance is of the utmost importance while the case is in limine; as the legal adviser may then pertimony may require explanation, and what testimony may require refutation by proofs, and not by mere Nomeaba and contradiction; and he can then got all the contradictions. requisite evidence for such purposes before the day of trial.

1892. Nov. 12.

In the present case, I was applied to by the prisoners' counsel for an interdict, and though such ex parte applications have to be considered and dealt with on the instant, I was careful in drawing the order only to use the words "legal adviser," which are the words used in the Ordinance and the Law, and I made no reference to law agents. The examination, too, was not absolutely interdicted, and might have been proceeded with if the Magistrate had allowed a legal adviser to be present, and this I think that he should have allowed, notwithstanding the discretion claimed by him under the second provision in sec. 4 of Law 16, 1861.

I am not in the habit of referring to the Civil, Roman Dutch or English Laws when I consider our own statute or written Law is clear and intelligible, but as our Law 16, 1861, adopts the provisions of, and no doubt was moulded on, the enactments of the English Imperial Statute, 11 and 12 Vic., c. 43, I refer to that Statute to point out that prior to its passing (1849), at any preliminary examination, or investigation of a charge of felony before a Justice of the Peace in England, a legal adviser could not be present unless as a matter of courtesy: but since the passing of that Statute, the delinquent has his counsel or attorney as a matter of right. We have followed the English procedure in this respect, although our legislature were twelve years before so doing, and I regard the enactment in sec. 4 of our Law 16 of 1861, as of equal force with sec. 12 of 11 and 12 Vic., c. 43, and as complete in itself without reference to the succeeding provisoes; which in my opinion only relate to the room or building in which an examination is held; and to the access thereto of the general public.

This is the first time that I have heard of a prisoner being denied a legal adviser on his examination, although I have been 33 years in the Colony; and I do not think the question has been ever raised before; on the other hand, it is to be observed that nine years after the passing of Law 16, 1861, Law 5, 1870—"To amend the Law of Evidence" -has a clause (No. 8) which seems to show that the legislature assumed that criminals had such assistance on preliminary examinations, as it provides that certain criminals referred to in that Law should only be bound by evidence 1892. Nov. 12. Regina v. Nomcaba and others.

given by them in answer to their own counsel or the like, or on their own examination or the like of themselves, and not by any evidence given by them on cross examination, or in answer to any question put to them by the Magistrate.

As to the want of notice, or reference, to the Attorney-General, when the application came before me; as the Attorney-General, who is the public prosecutor, does not interfere with a preliminary examination until the papers are forwarded to him by the Magistrate, and as the time had not come for such a reference, I thought it right to act promptly to avoid the irreparable injury which the applicant for the interdict in his affidavit stated might result to his clients in the absence of a legal adviser.

I may here state that I cannot imagine a case in which the ends of justice would be best answered by refusing the access of a legal adviser. The "ends of justice" surely include justice to the prisoner as well as to the public?

But, even if I am wrong in holding that the prisoner as a matter of right is entitled to the assistance of a legal adviser during his preliminary examination, and if the Resident Magistrate can in his discretion exclude the legal adviser, then I submit the Magistrate must show good cause or special grounds for so doing if his action is called in question.

The Magistrate surely cannot exercise his discretion on a bare "sic volo?"

Of course it goes without saying that if a legal adviser or any other person misconducts himself, that legal adviser or person can be removed from, or be prevented entering, any Court during judicial proceedings, but so long as the legal adviser behaves himself properly, I cannot see why he should be excluded. Now, however, we have certainty for uncertainty, which is always desirable, as it is now decided that, notwithstanding the enactment in the 4th section of Law 16, 1861, a prisoner is not entitled to the access of his legal adviser as a matter of right on his preliminary examination.

Per curiam: The interdict set aside.

[Attorneys for the Defendants: LAUGHTON & TATHAM.]

RANDLES BEOTHER & HUDSON (Applicants) v. The STANDARD BANK OF SOUTH AFRICA AND OTHERS (Respondents).

1892. Nov. 26.

Interdict. Application to set aside. Disputed facts.

Randles Bro. & Hudson v. The Standard Bank & others

Interdict having been granted in respect of a sum of money in a bank, application to set aside refused, on the ground that, the evidence as to ownership being conflicting, it would be better to allow the money to remain in the bank.

(In banco).

This was an application on behalf of Kajee Rahmtoola, a Mohammedan priest, for an order setting aside an interdict granted on the 25th October, 1892, at the instance of Randles Brother and Hudson, whereby the Standard Bank was interdicted, along with two Indians named Parsee Rustomjee and Shaikjee Hamed, from paying over (1) a sum of £800 lying in the Bank to the credit of the present applicant, and (2) certain moneys amounting to £150 in the hands of the other respondents.

The evidence as to the ownership of the money was very voluminous on both sides and was of a contradictory nature. The present applicant swore that the sum of £850 was made up of moneys brought by him to the Colony, added to by business gains and his fees and other receipts as priest. On the other hand, it was alleged that the applicant was without means when he arrived in the Colony, that his earnings had been insignificant in amount, and that the funds in question really formed part of the assets of a firm of Indian traders who were largely indebted to Randles Brother and Hudson, in whose interests the interdict had been obtained, and who had been authorised to bring an action in respect of their claim.

Laughton (with him R. H. Tatham) for the applicants.

Morcom, A.G., for the respondents.

Gallwey, C.J.: The affidavits are conflicting. We cannot authorise the money to be removed until the question of ownership has been settled by action.

WRAGG, J.: It is desirable that the money should remain

1892. Nov. 26. in the bank. It will be safe there until the action has been decided.

Randles Bro. & Hudson r. The Standard Bank & others

TURNBULL, J.: I am of the same opinion.

Per curiam: Application refused. Costs reserved.

[Applicant's Attorney: R. H. TATHAM. Respondents' Attorney: W. BURNE.]

1892. Nov. 26. In re The Insolvent Estate of Ismail Temol.

In re I. Temol. Insolvency. Debtor's Petition. Presentation by Agent.

Debtor's petition accepted by the Court (Turnbull, J., dissentiente) such petition being presented in the name of a person holding the absent debtor's general power of attorney.

(In banco).

Laughton presented the petition of the above-named debtor signed by one Amod Miad under a general power of attorney in the usual form. The debtor had left the Colony and was residing in India.

GALLWEY, C.J.: It appears that the estate left to Amod Miad to administer was insolvent. I have some doubts whether the power of attorney can be said to have been given for the purpose of "administering" the estate of the absent debtor when the effect of such power extends only to the surrender of the estate. I think, however, that we may accept the surrender.

TURNBULL, J.: I am not in favour of accepting a surrender on a petition presented under a general power of attorney; it should, I think, be under a special power to administer the estate of the absentee, vide sub-sec. (b) of sec. 6 of Law 47, 1887.

Per curiam: Surrender accepted.

[Applicant's Attorneys: LAUGHTON & TATHAM.]

In re The Insolvent Estate of Ismail Temol and Amod Miad.

Nov. 26.

In re Temol and Miad.

Insolvency. Debtor's Petition. Partnership Firm.

Debtors' petition refused, where it appeared to the Court that it was presented by one of the partners of a firm which had been dissolved some years prior to the date of the petition.

(In banco).

Laughton presented the petition of Ismail Temol and Amod Miad, lately carrying on business at Pietermaritz-burg as Ismail and Amod, storekeepers, for the surrender of their partnership estate. The affidavit of one of the partners, Amod Miad, alleged that the firm had been dissolved in August, 1889.

GALLWEY, C.J.: We cannot in law accept the petition of a firm which has ceased to carry on business. The partnership appears to have been dissolved three years ago.

WRAGG, J.: I do not see how we can in law accept this surrender.

TURNBULL, J.: The petition will have to be refused.

Per curiam: Application refused, with leave to move again.

[Applicants' Attorneys: LAUGHTON & TATHAM.]

In re Charles Edward Duncan.

1892. 'Nov. 26 & 28.

Insolvency. Debtor's petition. Rights of judgment creditor. In ro Duncan.

Smallness of deficiency.

Debtor's petition refused with costs, where it appeared to the Court that the debtor had lodged notice of intention to present his petition in order to evade execution of a



1892. Nov. 26 & 28. In re Duncan. judgment obtained by a vigilant creditor, and that after rejecting a doubtful claim and deducting assets the liabilities of the debtor were of small amount.

(In banco).

Laughton presented the petition of the above-named debtor showing assets £135 10s. and liabilities £228 8s.

Coldridge, on behalf of Randles Brother & Hudson, judgment creditors, opposed. He contended that the object of the petition was to defeat the judgment creditors. Even if the surrender were accepted, the Court had power in such circumstances to order the claim of a judgement creditor to be paid in full with costs, (in re McLeod & Co., Buch. Rep. 1876, p. 1.)

Wrage, J.: The case cited seems to be in point. It is clear that something of the kind must have been contemplated when the provision at the end of sec. 7 of our Insolvency Law was framed, by which power is given to the Court to hear objecting creditors and to accept or dismiss the petition.

GALLWEY, C.J.: The facts appear to be as follows:—On the 28th July last, at the instance of the creditors now objecting, an interdict was granted by a Judge in Chambers to prevent the removal of a wagon, the property of the debtor, then on its way to Zululand. I find that there was, on the 1st August, an attachment under that order, and, on the 15th Sept. Messrs Randles Bro. & Hudson obtained a judgment in this Court against the debtor; execution was issued on the following day, the defendant's oxen being attached thereunder. On the 11th October, the Sheriff notified a sale of the property to be held on the 27th October, and, on the 18th October, the debtor gave notice of his intention to surrender. There had been an application by the debtor's brother, who claimed the wagon and oxen, on the 20th September, for release of the property from the attachment, which was granted subject to an action being brought within 10 days and upon sufficient security being given. No such action was instituted. that there was first an attempt by the brother to defeat the judgment creditor and afterwards the debtor's own notice with the same object. I quite admit that there should be no priority for a creditor who "snatches" a judgment, but I object to an abuse of the process of this Court to enable a debtor to evade execution of a judgment obtained against Nov. 26 & 28. him. We have under the Law a discretion to accept or dismiss a debtor's petition, and I regard this as a case in In re Duncan. which there should be a dismissal.

Wrace, J.: I observe that, if the wagon and oxen go to pay the judgment creditor, and if the very peculiar claim of the debtor's brother be rejected, the liabilities of this estate, after deducting assets, amount to only £38. Surely, the debtor can work this off. My view is that we ought not to allow an estate to be surrendered under such circumstances. We ought also to take into account the vigilance of the judgment creditor, which is one of the facts of the case. It is, to my mind, eminently undesirable to accept this petition and I would refuse the application.

Turnbull, J.: In applications of this kind the Court may, under sec. 7 of the Insolvency Law, make such order as shall to justice appertain. I am not at all satisfied with the petitioner's conduct. He has not conformed with the Law requiring a "true statement on oath of the whole of his estate and effects," inasmuch as his schedule contains no reference to the proceeds of his right to certain immovable property in which it seems that he was interested. We must take the debtor as bound by his statement that the wagon and oxen valued at £120 are assets of his estate. I think that we should make no order that might prevent Messrs Randles Brother & Hudson as vigilant creditors from obtaining the full benefit of their vigilance.

[Applicant's Attorneys: LAUGHTON & TATHAM.
Attorneys for the objecting creditor: Boshoff & Coldridge.]

T. H. DRURY & Co. v. MARY AGNES DALY.

MARY AGNES DALY v. T. H. DRURY & Co.

1892. Nov. 8, 9, & 30. Drury & Co.

v. Daly.
Daly v. Drury
& Co.

Magistrate's Court. Jurisdiction. Illiquid and liquid claims, Law 22, 1889, sec. 23. Husband and wife. Assistance of husband in passing bond. "Public Trader." Judicial Separation. Husband's business continued by wife. Rights of creditors.

1892. Nov. 8, 9, & 30. Drury & Co. v. Daly. Daly v. Drury & Co.

Under sec. 23, Law 22, 1889, it is competent to sue by one summons in respect of a claim upon a liquid document and a claim for goods sold and delivered, etc. to the extent, in each case, of the jurisdiction conferred by subsecs. (a) and (b) of that section.

- A married woman trading alone may be sued on a notarial bond, passed in respect of the liabilities of such business, without the assistance of her husband.
- A married wowan may be regarded as a "public trader" to the extent of her public dealings alone, and to be so regarded it is not necessary that she should so trade generally.

Where a married woman, judicially separated from her husband and trading alone, had given a notarial bond to a creditor for the balance due on an account for goods supplied to her by the creditor during two years since such separation, Held: That no deduction could be made for a balance of debt due to the bond-holder taken over by the wife, at the time of the separation, from her husband's business continued by her, as the account with the creditor was a running one, and such balance of debt had been absorbed by payments made at various times by the wife to the creditor.

(In banco) before GALLWEY, C.J. and TURNBULL, J.

This was a cross-application for a review of the judgment of the Magistrate of the City Division,

The appellants Drury & Co. sued Mrs. Daly in the Court below, in one summsns, for £87 9s. 6d., being £75 balance due on a notarial bond, £6 19s. for goods sold and delivered, and £5 10s. 6d. money paid for the preparation of said bond, and for interest.

It appeared that on the 11th March, 1889, Mrs Daly and her husband had executed a deed of separation, under which the wife had liberty to carry on such business as she

might think fit, and which declared that she should enjoy and absolutely dispose of after-acquired property as if she were a feme sole and unmarried. Neither party was to be Drury & Co. liable for the debts of the other. The husband ceded and Daly v. Drury made over to his wife his stock-in-trade and business as a & Co. soda-water manufacturer, and the wife undertook to pay the liabilities of such business, which included a balance due on open account with the plaintiff firm of Drury & Co. This deed of separation was afterwards made an order of Court.

Mrs Daly by herself carried on the business, which, in February, 1892, owed Drury & Co. £91 7s. 8d. as balance of account for goods sold and delivered, for which amount she executed, on the 29th February, and without her husband's assistance, a notarial bond in favour of Drury & Co. hypothecating the whole of her stock-in-trade, etc. manager stated in evidence that the bond-holder's debt taken over by Mrs Daly from her husband's business had long since been extinguished by her payments to the firm.

The defendant took exception to the summons in the Magistrate's Court on the ground that the bond had been executed without the husband's assistance, and also on the ground of want of jurisdiction, the claim being under two heads-in respect of a liquid document and on open account.

The Magistrate overruled both exceptions, and ultimately gave judgment for the plaintiff for £12 9s. 6d. without costs. The reasons for judgment showed that the Magistrate held the bond to be invalid by reason of the exception "de authenticæ si qua mulier" not having been renounced. He therefore rejected the claim on the bond and found for the other items in the summons.

The plaintiffs appealed on the following grounds: (1) That Mrs Daly had not bound herself as surety for her husband, (2) That even if otherwise, she had been benefitted by the transaction, (3) That as a public trader, she had become surety for her creditor.

The defendant entered a cross-appeal, on the ground that the Magistrate had wrongly overruled the exceptions of want of the husbands assistance and of jurisdiction, that Mrs Daly was not a public trader, and even though she were the bond was bad on other grounds.

1892. Nov. 8, 9 & 30. Drury & Co. v. Daly. Daly v. Drury & Co.

Coldridge, for the appellants Drury & Co.: Mrs Daly being a public trader, and the deed of separation between her and her husband having been made a rule of Court, the husband's assistance in passing the bond was not necessary. The business had been ceded to the wife, and the bond, being a matter relating to the business, cannot be set aside in the absence of fraud or duress (Van der Linden (Henry) p. 84, et seq.; Grotius (Maasdorp) sec. 26; Jur. Obs. Vol. IV., p. 27; Van Leeuwen, R. D. L. (Kotze) Vol. I. p. 43; Van der Linden, Jud. Pract. Vol. I, p. 94; Oak v. Lumsden, 3 Juta, 144; Est. Cowell, 10, N.L.R., 137). A pledge of movables by a married woman differs from a mortgage over immovable property, and does not need the husband's assistance (Van der Linden (Juta) p.p. 93 and 94; V. Leeuwen, R.D.L. (Kotze) Vol. II. p. 83). The debt resulting in the bond included a balance taken over from the husband's business under the deed of separation. The bond was not in the nature of a security for the husband, and the exception si quá mulier did not require to be renounced. But the wife received benefit from the bond and is thereby precluded from setting up that exception. She either became security for her creditor or gave the bond in connection with her business (Van Leeuwen (Kotze) 621).

Tatham, for the respondent M. A. Daly: An order of separation a mensa et thoro does not dissolve the bond of matrimony so as to enable the wife to appear in Court without her husband's assistance or to be regarded as feme sole (Marshall v. Rutton, 8 Term. Rep. 545; Lewis v. Lee, 3 B and C., 291). The bond is not good merely because the wife was a trader (in re Williams, 5 N. L. R., 288). The execution of a notarial bond is a judicial act (Ten. Not. Man. sec. 1) and requires the husband's assistance (re A. Hamel v. Panet, 2 App. Cas. 121: in re Cowell, vide

supra; Maxwell v. Maxwell, 8 N.L.R., 220.

The Magistrate had no jurisdiction. Under the repealed Ordinances and Laws, a magistrate exercised jurisdiction under three several statutes, and under Law 22, 1889 there are two distinct classes of jurisdiction and a claim including both cannot be decided by one action (Amsden v. Johnson & Co., 6 N.L.R., 102). Exception to the jurisdiction need not be taken in limine, but may arise on review (Draper v. Dimock), 5 N.L.R., 79). [He also cited, with reference to the renunciation of benefits, Voet 16, 1, 10; Raw v. Macalister (6 N.L.R., 10 and C. J. Kotze thereon (Van Leeuwen, vol. 2, p. 621).; Zeederberg v. Union Bank, 3 Juta, 290; Natal Bank v. Bond (not reported).

Coldridge in reply:—The Magistrate admitted his jurisdiction by hearing the case and cannot reverse his decision (Foster v. Loram, 5 N.L.R., 297): Amsden v. Johnson (vide Drury & Co. supra) is distinguishable, as there the whole amount was Daly v. Drury beyond the jurisdiction.

1892. Nov. 8, 9 & 30.

Tatham, in reply cited Schenk v. Lamb, 2 N.L.R., 174.

(Cur. adv. vult.)

Postea, Nov. 30, 1892, in banco.

The following judgments were delivered:—

GALLWEY, C.J.: - This is a review of the judgment of the Magistrate of the City Division. The action was for the recovery of £87 9s. 6d., being £75 for the balance due under a notarial bond, £5 10s. 6d. for the cost of preparing the bond, and £6 19s. 0d. for goods sold and delivered since the passing of the bond. I confess that I should have had no difficulty in deciding upon the case had it not been for the judgment of Sir Henry Connor in the case of Amsden v. Johnson & Co. (vide supra). That case, however, is to be distinguished, as the action was consolidated under two different statutes—Ordinance 16, 1846, and Law 10, 1868. But the difficulty has been removed by an alteration of the law. The present Law, No. 22, 1889, gives jurisdiction to Magistrates in civil cases, (Durban excepted) up to £100 where the claim is founded upon a liquid document of debt, and up to £50 where the claim is for damages, or is illiquid in its character and is due upon contract, or for goods sold and delivered, or as balance of account or otherwise.

Now, I think that common sense and the desire to prevent litigation and to save unnecessary expense would lead one to hold that, although the different kinds of jurisdiction are defined in two sub-sections, (a) and (b), there is nothing to prevent a suitor claiming in one action a sum due under a liquid document of debt and also an amount in respect of goods sold and delivered; and, therefore, without expressing any opinion on the decision in Amsden v. Johnson & Co. (vide supra), I consider that so long as each claim is within the amount specified in the sub-section relating to it, a plaintiff can include both causes of action in one summons, and is not obliged to sue on the same day in a Magistrate's Court for say £50 under sub-section (a) and £25 under sub-section (b).

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Now, as to the claim for £75, whatever the Magistrate's decision may have been, the entire question before us is whether or not the bond was a good bond, seing that the husband of the pledger was no party to it, and did not assist in its execution.

I am clearly of opinion that Mrs. Daly was a public trader, and this does not necessarily mean that she traded generally, but, in accordance with the definition of Sir Henry Connor, that for the purposes of this bond and the business in respect of which it was given, she traded publicly, whatever may have been the nature or extent of her dealings.

On this ground, I am of opinion that the husband's assistance was not necessary, and that the benefit de authentica si qua mulier did not apply.

The bond is dated the 29th February, 1892, and was executed by a married woman in favour of a person from whom she had purchased supplies on account of debts extending over two years, the balance on the 29th February, 1892, being the sum secured. I thought that possibly, from one's natural tendency to be lenient to a woman executing a Notarial Bond, the liability taken over from the husband's business might be included in the balance due, but the account was a running account, and that liability had long been extinguished by payments made at different times. It is not competent for the debtor to say under these circumstances "I have no property that you can take, as all the goods which you supplied to me have been disposed of, but I have other property which you cannot touch."

In my opinion, therefore, after seriously considering the case and the Magistrate's reasons for judgment (which I regret to say do not commend themselves to me) I am of opinion that the judgment of the Court below must be corrected into a judgment for the plaintiffs for the full amount of their claim.

WRAGG, J.: I was not present at the hearing of this review, and I therefore take no part in the judgment.

TURNBULL, J.: The case of Amsden v. Johnson & Co., heard in this Court on the 1st May, 1885, is distinguishable from the present case.

When that case was decided, the Ord. 16, 1846 (now repealed) limited the extent of the City Magistrate in all civil cases for damages other than those referred to in Ord. 2, 1850, c. iv., to the amount of £15; and under Ord. 2,

1850, his jurisdiction as between Masters and Servants, Nov. 8, 9 & 30. as regarded any amount for wages or remuneration or

compensation or damages, was restricted to £20.

Subsequently, by Law 10, 1868 (now repealed) the City Daly v. Drury Magistrate's jurisdiction was extended in certain civil & Co. cases, including debts due on contract, but excluding, as not mentioned or provided for, amounts claimed by way of damages, to £50.

Drury & Co.

That then being the state of the Law in 1885, when under one and the same summons the plaintiff Amsden claimed £26 6s. as "the amount of 4 months and 12 days salary, or wages and travelling and board und lodging expenses" "less certain sums of money received on account," . namely:—

4 months and 12 days salary at £10 to 12th February, 1885	month	£4 3	19	0
m 111 T1	•••		10	0
Less Cash received at various times	 		9	•
		22	<u> </u>	
		£26	6	0

"together with £5 damages and costs," I cannot help thinking that the Court must have been of opinion that the summons should have set forth distinct claims for wages as a debt under contract, and for the separate amount for damages; and then if the £26 6s. had been claimed as a debt due on contract under Law 10, 1868, and the £5 damages had been claimed under Ord. 16, 1846, I think the jurisdiction of the Magistrate would not have been called in question. The necessity for specifying the Ordinance or Law under which proceedings are taken in the case of claims distinct in their nature, arises from the fact that the provisions in one ordinance or law as a general rule differ to some extent from the provisions of other ordinances or laws, even when these several ordinances or laws relate to the same subject matter.

I, however, know of nothing to prevent two or more distinct claims, whether liquid or illiquid, or liquid and illiquid, being contained in the same summons, provided that any special law bringing the claim within the Magisterial jurisdiction is clearly set forth and referred to in the

summons.

That two claims on separate and distinct documents can be included in one summons has been recognised in the Cape Colony (see Simpson v. Naude, E.D. Court Reps., 2

1892. Nov. 8, 9 & 30. Drury & Co. v. Daly. Daly v. Drury & Co. Vol., p. 156), where, when two summonses on separate promissory notes had been taken out at one and the same time, and were returnable on the same day, the Court, although granting provisional sentence in each case, only allowed the costs of the first case, considering the two claims should have been made in the same summons.

In the present case, therefore, as by Law 22, 1889, which repealed Ord. 16, 1846, and Law 10, 1868, the Magistrates (Durban excepted) under sec. 23 have jurisdiction up to £100 where the claim or debt is founded upon any bond; and up to £50 where the claim is for goods sold and delivered, or for any claim or debt illiquid in its character and due upon contract, I am of opinion that the Magistrate could have given judgment in favour of the plaintiffs under the bond (if valid) for any amount found due to them thereunder up to £100, as well as for the £12. 9s. 6d. which he found the plaintiffs entitled to for goods sold and delivered: and therefore I would alter his judgment by further allowing to the plaintiffs the amount found due under the Notarial Bond and with costs.

I consider that the bond passed by Mrs. Daly on 29th February, 1892, though unassisted by her husband or a curator ad litem, is a valid bond; -having been passed before a Notary, a public functionary; and having been passed under and by virtue of the deed of separation of the 11th March, 1889; which deed her husband agreed that she should follow and carry on any trade or business she should think fit to carry on, and should possess free from any claim or demand of his, any property which she should at any time thereafter acquire or become entitled to, and that she should enjoy and absolutely dispose of the same as if she were a feme sole, and unmarried; which deed was signed by the spouses, and afterwards on the 19th March, 1889, was made a rule or order of the Supreme Court, after an action had been brought and declaration filed by Mrs. Daly, assisted by her curator ad litem, against her husband for a separation d mensa et thoro. The cross action calling in question the validity of the bond therefore fails.

Per curiam: The Magistrate's judgment corrected into a judgment for the plaintiffs for £87 9s. 6d. and costs. Costs of the review granted to the plaintiffs in the Court below.

[Attorneys for the Appellants T. H. Drury & Co.:

Attorneys for the Appellant A. M. Daly:

Boshoff & Coldridge.

Laughton & Tatham.]

In re TESTATE ESTATE OF JAMES STANTON.

1892. Oct. 25. Nov. 30.

Executor. Testate estate. Surviving executor.

In re Stanton.

Leave granted to survivor of two executors testamentary to act alone, it appearing to the Court that the specific trusts and directions contained in the will had as far as possible been carried out. [Turnbull, J., dissentiente.]

(In banco).

Mason, on behalf of John Allkins, the surviving executor of the will of James Stanton, moved for an order authorising him to act alone.

The will devised the estate to the the deceased's son and daughter. The former was the executor who had died, the latter was the wife of the surviving executor. There were trusts for the support of the widow, now of advanced age. It appeared that the directions contained in the will had been carried out so far as was possible during the widow's life-time.

GALLWEY, C.J.: The will contains specific instructions which have been duly carried out. There will be no danger to anyone by our granting the application. Similar orders have been made in several reported cases.

WRAGG, J.: In my opinion, this is a case in which we ought to give relief.

TURNBULL, J.: I am not satisfied. There is nothing in the will to indicate that the testator intended either his son or his son-in-law to act alone; but provision was made for them to exercise the power of assumption, substitution and surrogation. The Court, I think, should first know how the trusts of the will have been so far carried out. We have no information as to whether the deceased son, John Stanton, left issue who might yet be interested under the will. I think that the circumstances differ from those of the reported cases in which relief has been granted.

Per curiam: Order as prayed.

[Applicants' Attorneys: HATHORN & MASON.]

1892. Nov. 30. ZWAKALAPI (Appellant) v. JARDINE (Respondent).

Zwakalapi v. Jardine. Magistrate's Court. Security for judgment and costs on appeal. Rule 35.

Native. Exemption from Native Law. Evidence required by Court.

Rule 35 of Inferior Courts of Justice is ultra vires, in so far as it requires an appellant to find security for the judgment and costs in the case appealed from.

The Court will not hear a review where the appellant, a native claiming to be exempted from Native Law, had been sued in the Court below by an unexempted native, in the absence of the proof of exemption required by sec. 17, Law 28, 1865. Case accordingly remitted to the Magistrate for hearing de novo upon the requisite proof of exemption.

The Magistrate ordered to attach a copy of the letters of exemption (if any) to the record.

(In banco).

This was a review of the judgment of the Magistrate of the Umgeni Division. The appellant, who was described as a native exempted from Native Law, had been sued by the respondent, an unexempted native. The cause of action is not material to this report.

Gallwey, for appellant, asked for a decision of the Court on the question of whether or not the Rule 35 of Inferior Courts of Justice, as to giving security by the appellant for the judgment and costs, could be enforced.

WRAGG, J.: I have twice decided, in the Durban Circuit Court, that Rule 35 is, in this respect, ultra vires.

GALLWEY, C.J., and TURNBULL, J., concurred in this view, and the Registrar was directed accordingly.

The review then proceeded. It appeared that there was no document on record to show that the appellant had been exempted from the operation of Native Law.

Gallwey, C.J.: Law 28, 1865, sec. 17, casts the burden of proof on the person claiming to be exempted, such proof

to be by production of his letters of exemption. How can we hear the review without some evidence of exemption? There is absolutely none in this case.

1892. Nov. 30. Zwakalapi v.

Jardine.

Another point may arise—what is the Law applicable in such cases to a transaction occurring before the issue of letters of exemption, the common Law of the Colony or Native Law?

Per curiam: Case remitted for hearing de novo, after due proof adduced, as required by Law 28, 1865, sec. 17, of the appellant's exemption from Native Law. The Magistrate to attach to the record a copy of the letters of exemption if produced. Costs reserved.

[Appellant's Attorney: W. J. GALLWEY.]

In re The Ladysmith Local Board (ex parte).

1892. Nov. 30.

Township. Arrear rates. Sale of unoccupied lands in satisfaction

In re Ladysmith Local Board.

The Supreme Court is unable to give relief in respect of a petition from a Local Board for authority to sell unoccupied lands in satisfaction of arrear township rates due thereon, there being no provision in Law 11, 1881, or Law 39, 1884, similar to that contained in s.s. 120 and 121 of the "Municipal Corporations Law, 1872."

(In banco).

This was a petition by the Chairman of the Local Board of the township of Ladysmith for an order authorising the sale of certain unoccupied township erven in satisfaction of the arrear rates due thereon.

Janion, for the petitioner, pointed out that the laws relating to townships made no provision for the recovery by process of sale of rates due on unoccupied immovable property. Writs had been issued in terms of s. 14, Law 39, 1884, but there was no mode of dealing with such property analogous to that provided in secs. 120 and 121 of the "Municipal Corporations Law, 1872."

Nov. 30.

In re Ladysmith Local
Board.

GALLWEY, C.J.:—We have no power to make the order asked for. The Local Board should approach the legislature.

The application was withdrawn by leave of the Court.

[Applicants' Attorneys: Janion & Robinson.]

1892. Aug. 16. Nov. 30. In re James Malcoln and his Wife.

Husband and Wife. Antenuptial contract. Income of property specified in marriage settlement. Construction of covenants.

A marriage settlement, after the usual covenants of an antenuptial contract removing community of goods and of profit and loss and creating separate estates, provided (sec. 7) that the husband should, "during the existence of the said intended marriage have the sole and exclusive administration of all the property, estate, and effects of his said intended consort, notwithstanding anything herein contained to the contrary, for the purpose of the support of the said intended marriage, for which purpose he may at all times appropriate the income and profits thereof," but not to the extent of any mortgaging The deed proceeded to appoint trustees, and provided further (sec. 9) that in consideration of the marriage the wife agreed "to transfer and make over to the said trustees or trustee, upon trust for the ends, uses, and purposes aftermentioned," certain five lots "upon trust that they shall pay and allow to the said [wife] the free life rent of the said properties and the rents, income and profits thereof during her lifetime," after deducting the trustee's expenses and remuneration. The settlement then provided (sec. 10) for the sale of the lots, by consent of the spouses, and appropriation of the proceeds, and for the events of the death of the spouses, with provision for the children if any.

HELD:—That the provisions of sec. 9 of the settlement required the trustees to pay to the wife the free life-rent of the property therein specified and the rents, income In re Malcolm and profit thereof during her life-time, subject to the stipulated deductions.

1892.

Order accordingly, without prejudice to the rights of the trustees of the husband's insolvent estate. costs and those of the wife to be paid out of the estate.

(In banco).

This application was originally made to WRAGG, J., on the 16th August, 1892, in camera, and was directed by his Lordship to be brought before the full Court.

The facts were briefly as follows:—

The parties were married in March, 1890, after executing the contract and settlement, the material covenants of which are indicated above. In July of the same year (the husband having meanwhile become insolvent) the spouses signed a deed of separation, in which the husband renounced all rights over any issue of the marriage. December, 1890, a child was born.

A rental of from £10 to £12 a month had accrued from the property settled on the wife. The husband claimed to receive the accumulation of these rents, but his claim was resisted by the wife. Under these circumstances, the trustees came to the Court for instructions.

Laughton, for the trustees.

GALLWEY, C.J.: An application with reference to this marriage settlement was made by the trustees of Malcolm's insolvent estate in November, 1890 (11 N.L.R., 275). then objected to the trustees of this settlement being allowed to deal with property in which children then unborn might be interested. What authority is there to show that the Court can deal with the matter on a motion?

Hathorn, for James Malcolm:—Clause 7 of the settlement gives the husband control of all property, notwithstanding Clause 9. [GALLWEY, C.J.:—Are there not really two settlements, that of the husband's property (clauses 1-8) and that of the wife's property (clauses 9-11)?

 Bale, for one of the trustees and Mrs. Malcolm:—Three distinct estates are dealt with in the settlement, first the husband's, then the wife's, and, in clause 9, the trust estate. The deed of separation does not provide for any alimony, so that the income should go to the wife, the husband being an uncertificated insolvent.

Gallwey, C.J.: When this question came before us, I asked for some authority under which we could decide it. The application appears to be based upon the practice introduced 20 years ago in England under the Trustees' Relief Act, by which parties may in such cases avoid the expense of an Equity suit and may have their rights declared summarily. (22 and 23 Vic., c. 35, s. 30, amended by 23 and 24, Vic., c. 38, s. 9). I, understand, however, that the parties immediately affected have agreed that the matter should be decided upon motion.

The question really is—To which of the spouses are the trustees bound under the deed of settlement to pay over the income arising from the trust property. No order that we make will bind the trustees of the husband's insolvent estate. Now, looking at the deed, is it not intended to save the settled property from the husband's control, and to give the income of that property to the wife for the purposes mentioned in the 9th clause? The deed also directs what is to be done upon the death of the parties and in the event of a child being born. How can we give effect to that otherwise than by declaring that the trustees are bound to pay and allow the income of the trust property to Mrs. Malcolm during her life-time? That is the order which I am prepared to make.

Wrage, J.: Mr. Bale's construction of this ante-nuptial contract commends itself to my mind. I am of opinion that there is no real conflict between the 7th and 9th sections thereof. I am satisfied that the trustees are bound, as against the husband, under the 9th section, to pay the rents to Mrs. Malcolm. All costs, except those of the husband, should come out of the estate.

TURNBULL, J.: I entirely concur.

Per curian: The trustees ordered to pay and allow to the wife the free life rent of the immovable property specified in clause 9 of the settlement, and the rents, income and profits thereof, during her life time, after deducting all the costs, charges, and expenses stipulated in the 9th

This order to be without prejudice to the rights of the trustee of the husband's insolvent estate. The trustees' costs and those of Mrs. Malcolm to be paid from the estate.

In re Malcolm

[Attorneys for the Trustees: LAUGHTON & TATHAM. Attorneys for Mrs. Malcolm: BALE & GREENE. Attorneys for James Malcolm: HATHORN & MASON.]

In re Roland Scudamore Meek (Plaintiff) v. The Colonial GOVERNMENT OF NATAL (Defendants).

Railway. Damages arising from construction. Compensa. Colonial Govt. tion for injury to property outside the 100 feet width. Laws 16, 1872, and 5, 1888. New Trial. road."

Meek v.

The Lands Clauses Consolidation Law (No. 16, 1872), not being referred to in sec. 11 of the Railway Extension Law (No. 5, 1888), is not "expressly varied" thereby, and is therefore applicable to a claim for compensation in respect of property outside the 100 feet width injuriously affected by the construction of a railway under the latter law.

Such compensation having been reasonably assessed by a jury, new trial refused.

The Government, in exercising the powers conferred by law in respect of railway construction, may not arbitrarily interfere with the rights of proprietors so as to cause unnecessary injury.

There may be more than one statutory "main road" between the same points.

Nov. 28 and 29. (In banco).

This was an application by the defendants for a new The action was heard before TURNBULL, J., and a common jury on the 9th, 10th, 12th and 13th September, 1892.

Nov. 28 & 29. Dec. 2. Meek v. Colonial Govt. The plaintiff was the proprietor of the farm "Hilda" in the Newcastle Division, through which the line of railway authorised by Law 5, 1888, from Sunday's River to a point near Coldstream, had been constructed.

The declaration claimed £575, as damages for the destruction of trees of saleable value, part of a cattle-kraal and a dam, within the 100 feet width, and as to land outside the 100 feet width, in respect of the removal of stone walling and fencing, and the use of the materials; severance of land improved by cultivation, irrigation, and the erection of buildings, kraals, &c.; destruction of cattle-kraals, a dam, and irrigation furrows, and the deepening of a stream; the use of unimproved land; the removal of surface soil and the deposit thereon of "spoil" heaps; injury to cottage and stable; destruction of fruit trees, &c.; prevention of access; and destruction of silo.

The plea denied that any land had been permanently taken outside the 100 feet, and pleaded specially as reported in 13 N.L.R. at p. 135. It also averred that no building was erected on any part of the land taken, and pleaded a tender of £156 and certain new work valued at £30.

There was a claim in reconvention for transfer of the land taken.

The replication joined issue.

The jury found for the plaintiff for £283 10s., and judgment was entered accordingly, and (by consent) there was a judgment for the plaintiff in reconvention as prayed.

In moving for a new trial, the defendants relied upon the following grounds:—

- (1) Excessive damages.
- (2) Verdict contrary to law and evidence in that compensation is restricted by sec. 11, Law 5, 1888, expressly varying the Lands Clauses Consolidation Law, No. 16, 1872.
 - (3) That the Judge should therefore have directed—
 - (a) That plaintiff had no claim for land taken.
 - (b) That plaintiff had no claim in respect of alteration of watercourse or alleged destruction of means of irrigation.
 - (c) That plaintiff was only entitled to compensation for stone walls and kraals removed from the site

of the railways, and not for damage to stable, Nov. 28 & 29. cottage, silo, and enclosure.

Dec. 2.

(d) That plaintiff had no claim for severance pro revention of access.

Meek v. Colonial Govt.

- (4) That the Judge misdirected the jury that the line of railway in question was not a main road, though a road constructed for the public use and benefit by order of Government.
- (5) That the Judge wrongly directed that Law 2, 1880, was applicable.

Morcom, A.G. (with him R. F. Morcom), for the applicants: The incorporation of Law 16, 1872, with Law 5, 1888, is in the same terms as in sec. 4 of Law 1, 1881. The case of Freeman v. the Colonial Government (9 N.L.R., 181, and 10 N.L.R., 71), decided under the latter law, explains the meaning of the term "expressly varied." It is where the Lands Clauses Consolidation Law is inconsistent with or inapplicable to the special statute that the former becomes "expressly varied" (Weld v. S. W. R. Co., 9 Jur., N.S., 510; Reg. v. G. W. Ry. Co., I. E. & B., 253; Metrop. Dist. Ry. Co. v. Sharpe, 5 App. Cas., 425; Colonial Secretary v. Behrens, 14 App. Cas., 331). The plaintiffs' title deed expressly withholds compensation save in respect of buildings. No buildings have been taken. The tender was ample.

There can be more than one main road between the same points (Law 33, 1874, sec. 5; Chich v. Col. Govt., N.L.R., 1877, p. 1).

Counsel then referred to the several items in the declaration, and contended that the damage done by the deposit of spoil could not be greater than the value of the land upon which it had been placed (Shelford on Railways, 4th Ed., Vol. 2, p. 247; Spencer v. Metrop. Board of Works, 22 Chan. Div., 142; Reg. v. Vaughan and others, 4 Q.B.D., 190), and that the Government was not restricted to the 100 feet for purposes connected with the construction of a main road (Law 9, 1870, sec. 13; Law 19, 1875, sec. 10).

Bale, for the respondent: The rights of the Government are restricted to the 100 feet width, and even within that width compensation may be claimed for buildings and in respect of land improved by cultivation, irrigation, or otherwise. With regard to injury outside the 100 feet, not 1892. Nov. 28 & 29. Dec. 2.

Meek v. Colonial Govt. only the land itself has to be reckoned but the effect on the property of the taking or using of the land, and the interference with the proprietor's enjoyment has to be considered, and that not merely to the extent of the value of the land. The question of damages is one peculiarly for a jury (East v. White, 12 N.L.R., 179). The width of an ancient main road is illustrated in Voet 8.3.3; Van Leeuwen, Cens. For., 2.21.11. Law 16, 1872, is incorporated with Law 5, 1888, for the purpose of ascertaining compensation for injury beyond the 100 feet, and has not been expressly varied. The cases decided under the English Lands Clauses Act of 1845 show that a proprietor is entitled to the fullest possible compensation (Brand and another v. Hammersmith and City Ry. Co., 2 Q.B.D., 47; Glover v. N. S. Ry. Co., 16 Q.B., 912; Hammersmith Ry. Co. v. Brand, 4 H.L., 171; Metrop. Board of Works v. Macarthy, 7 H.L., 243; Ford v. Metrop. Ry. Co., 17 Q.B.D., 12). [He also cited Freeman v. Čol. Govt. (vide supra); Chick v. Col. Govt. (vide supra); Raw v. Resident Engineer, 6 N.L.R., 48; Col. Govt. v. Natal Land and Col. Co., 10 N.L.R., 112 and vide supra; Reg. v. St. Luke's Vestry, 6 Q.B.D., 572 and 7 Q.B.D., 148, approving Ferrar v. Lond. Comm. of Sewers, 4 Exch., 229; Cator v. Lewisham Board of Works, 34 L.J., Q.B., 74; in re Darlington Local Board of Works, 35 L.J., Q.B., 45.]

Morcom, A.G., in reply.

(Cur. adv. vult).

Postea: 2nd December, 1892. (In banco).

Before Gallwey, C.J., and WRAGG, J.

The following judgments were delivered:-

GALLWEY, C.J.: This is an action brought by the proprietor of a certain farm for injury done to his farm by the construction of the railway through it. The claim was brought expressly admitting that there was no claim for damage done by the construction of the line. Paragraph 8 of the declaration reads:—"The defendant, at the time of the construction aforesaid, entered upon and took possession of, and still possesses, certain portions of the plaintiff's land outside the said one hundred feet." Therefore this action was brought for damage done to the farm outside the one hundred feet, and very little question arose as to the nice construction placed upon the law on a former occasion.

I can only say that I entirely agree with what was said by Lord O'Hagan (in Metrop. Board of Works v. Macarthy, 7 L.H., 243): "The policy of the Lands Clauses Consolidation Act, I apprehend to have been to prevent private caprices or selfishness from interfering with the prosecution of works designed for the public benefit; but to do this with strict regard to individual rights by securing ample compensation in every case in which individual sacrifice or inconvenience is found to be essential to the general good. It never contemplated that the community should profit at the expense of a few of its members, and, as the condition of redress, it only required proof by the owner of injury to

his property."

Sir Henry Connor said in the case of Freeman v. Colonial Government (N.L.R., vol. 10, at p. 73): "On ordinary principles of justice, if an owner of land has, under compulsion of law, to allow of an interest of his in the land being taken from him or injuriously affected, he should be compensated fully, unless legislation clearly provides other-And there cannot, I think, be any doubt that unless legislation has so otherwise provided, the tendency should be rather in favour of compensation than otherwise, in consequence of there being such compulsion. Legislation has, I think, clearly provided that except in certain specified cases there shall, in reference to railway construction, be no compensation to a landowner who is liable to the Government as to road sites, in respect of the one hundred feet width."

It has been argued in the present case, and the first question that arises is the construction to be placed upon the 11th section of the Law 5 of 1888. The question is whether the proprietor of this farm is entitled to any compensation except in the case provided in the title deed, for lands taken, used, or injuriously affected for the purposes of the railway. It has been contended that the insertion of these words, "is not entitled to compensation," so, expressly varied the application of the Lands Clauses Consolidation Act, that the proprietor could not recover in this action any compensation such as is provided for under the 41st section of that law. I concur that no compensation could be given for the land taken for the purposes of the railway, the extent and area of which was 5.08 acres. The area, by the claim, was said to include all lands taken and used permanently for the construction and maintenance of the railway. It only includes, in fact, the 100 feet.

Whatever might have been intended in the reference to the Weld case (vide supra), which was a very peculiar case, not of a new railway company but of an old company intending

1892. Nov. 28 & 29. Dec. 2.

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to construct a new line, it was held that the 16th and 17th sections of the Lands Clauses Consolidation Law, requiring the whole capital to be subscribed and a certificate obtained therefor, did not apply, as the special Act gave the company its choice of raising the money by debentures or otherwise for the purpose of the construction of the line. I was going into that point more fully, but on looking at the judgment of Sir Henry Connor in Freeman's case (10 N.L.R., at p. 74) I find it stated: "I think that it would be erroneous in point of construction, to hold that the object of section 41 of the Law 16, 1872, was defeated as to the lands outside the 100 feet width by either the Law No. 19, 1875, or No. 2, 1880, without any clear reference to that section of the Law of 1872." Assuming that to be a right construction of the law, I am of opinion that the Law of 1872 was not varied, as to land beyond the 100 feet, without reference to it under section 11 of Law 5 of 1888. Therefore in my opinion I have nothing to do with the 100 feet, except as to the claim I will mention later.

In my opinion, the question before the jury was what was the damage done to the land outside the 100 feet, and the plea to that was that the damage done to the land outside the 100 feet was only to the extent of £187, and the defendants were liable to that extent only. The jury took much time to decide. On one side competent witnesses stated that the damage was to the extent of £450; a practical farmer said it was £310, and another practical farmer put it down at £306, and the plaintiff himself at £800. On the opposite side Mr. Raw said it was £122, and Mr. Tatham £114. I think that in the construction of this line by contractors the only object they had in view was to make as much money as they could out of their contracts, and for the purpose of doing the work at the cheapest rate they could they paid very little care or attention to the injuries they were doing to the land or where they deposited the spoil. They delivered spoil from the banks, injuring the land, and when it was necessary to raise the work to make embankments for the line of railway they did not use that spoil, but they made pits, and took out of them soil for the purpose of making embankments. It was never contemplated by any Legislature that contractors acting for the Government were to deal so arbitrarily or act so indifferently as to the rights of proprietors. Perhaps this might also have been occasioned by the absence of the proprietor. The contractors took advantage of his absence to do things which he could have prevented.

Sir Henry Connor in Freeman's case (10 N.L.R., at p. 75) said: "I do not think, however, that I need he sitate to

hold that that enactment (Law 2, 1880) should be confined to severance by the railway as constructed on the 100 feet width." The Law 5 of 1888 did not expressly or impliedly repeal the Law of 1872, and therefore I have come to the conclusion that the jury had the facts before them, and that upon those facts they were warranted in giving damages, and as I consider the amount a fair one, I am not disposed to interfere with the verdict.

The only point on which I differ with my learned brother (Mr. Justice Turnbull) is as to his direction that there could not be two main roads over the farm. What the learned Judge intended to convey was that there could not be two parallel main roads over the same farm. I respectfully differ from my learned brother upon that point, but that is

not sufficient to disturb the verdict.

Wrace, J.: I quite agree with the judgment which has just been delivered, and I have nothing to add to it, except to remark that I also dissent from the view taken by the learned Judge, who presided at the trial, as to what constitutes a main road.

[The following judgment prepared by TURNBULL, J., was then read, in his absence, by WRAGG, J.:—

Turnbull, J.: If only my interpretation of the law to the jury was correct, although the amount for damages awarded by them may be a large one, I do not think it so excessive as to warrant our giving leave for a new trial: and as to the legal question, and notwithstanding the arguments of the learned Attorney-General, I still am of opinion that the provision for compensation secured to proprietors of land under section 65 of Law 16, 1872 (which is incorporated with Law 5, 1888), is applicable in this case; as it is not expressly varied by any provision in this latter law.

I read section 11 of Law 5, 1888, as having reference

I read section 11 of Law 5, 1888, as having reference only to compensation "for the land taken;" but I hold that compensation can be legally claimed for damage done by works carried out under the law which injuriously affect the land not taken. This would of course include buildings in immediate contact with the land taken which were injured by the railway constructors when exercising the power given them by law, as well as other injury done to the adjoining land of the proprietor.

It is also to my mind a question for the Court, or for the jury when there is one, to decide whether the land taken is in excess of what is absolutely required for the purposes of the railway; for although it seems to be admitted that a

1892. Nov. 28 & 29. Dec. 2. Meek r. Colonial Govt. 1892. Nov. 28 & 29. Dec. 2.

Meek v. Colonial Govt. railway being a road made for the public good by order of the Government, is entitled to a strip of land of 100 feet in width out of the lands over which it is constructed;—any excess on this quantity I consider must be shown to be absolutely necessary and required for the proper construction of the railway with all stations, sidings, approaches and conveniences connected therewith. In the absence of Law No. 33, 1874, which empowers Government to declare any road to be a "main road," I would find it difficult to conceive how there could be two main or principal roads between the same two places.

I would therefore refuse the present application—and

with costs.

Per curiam: Application refused with costs.

[Applicants' Attorney: R. F. MORCOM.

Respondent's Attorneys: Anderson & Watt, Newcastle.]

1892. Dec. 2. In re HENRY PAUL DE GUNZBERG.

In re Gunzberg. Review. Magistrate's judgment in a criminal case.

The Court will not exercise its powers of review in the case of an appeal from the judgment of the Magistrate in a criminal case, where the appellant has undergone his sentence of imprisonment.

(In banco, before GALLWEY, C.J., and WRAGG, J.)

The Registrar presented the petition of the person abovenamed for leave to appeal in forma pauperis from the judgment of the Resident Magistrate of Durban, whereby the petitioner had been found guilty of theft and had been sentenced to a term of imprisonment, which it appeared had been undergone.

Per Gallwey, C.J.: There is no appeal in a criminal case where the sentence of imprisonment has been undergone.

[The Court made no order.]

In re The Insolvent Estate of Mamoojee Amod & Co., Dec. 6, 13, 14. ex parte MAX HEILBUT & Co.

In re

Insolvency. Proof of debt. Valuation of security. Amend- Amod & Co. ment. Alleged mistaken estimate of value.

[Insolvency Law, 1887, secs. 119, 120, 121, Sched. 1, sec. 14, Sched. 2, secs. 10-14.]

Application to amend valuation of security by a proving creditor, refused (Per Gallwey, C.J.), it appearing that 12 months having elapsed since the admission of the proof, the trustee had been allowed to deal with the security, and that there was nothing to show the nature of the mistake, the evidence on that point being conflicting; the proof also having been duly sworn to by the creditor himself and there being some doubt as to the bona fides of the alleged mistaken proof.

Per Gallwey, C.J.: Semble—That it was open to the creditor to move for an order upon the trustee to distribute the proceeds of the security up to the amount of the claim; and that (approving in re Dodds ex parte Vaughan, 25 Q.B.D., 529) the fact of the trustee having admitted a proof upon a wrong valuation did not preclude him from correcting the proof to its proper value.

(In camera: Before GALLWEY, C.J.)

This was an application by the agent of Max Heilbut & Co., of Durban, for an order authorising his principals to amend a proof of debt and valuation of security admitted by the trustee of the insolvent estate of Mamoojee Amod & Co.

The proof had been sworn to by the creditor, Heilbut, on the 5th June, 1891, and was in respect of a claim of £2,029 18s. 9d., the amount of certain bills of exchange and interest. The security was a notarial bond for £4,000 over the stock in trade, &c., of the debtors, and was valued for the purposes of proof at £1,000. The claim was proved and admitted on the 25th June, 1891.

In moving the Court, the present applicant stated that he had ascertained that the security had been undervalued, Dec. 6, 13, 14.

In re

Mamoojee
Amod & Co.

inasmuch as it ought to have been estimated at the full amount of the claim, namely, £1,998 16s. 11d., instead of at £1,000, such erroneous valuation having been made in good faith, on a mistaken estimate of the real value.

The estate of the insolvents was for the most part situated in the S. A. Republic, there being in that country stock in trade, &c., worth over £10,000, the greater part of which was included in the security. The assets had been realised, and had produced a sum considerably in excess of the value placed upon the security in the proof.

On the 29th May, and again on the 2nd June, 1892, the trustee tendered to the creditors payment of £1,000, the assessed value of their security, but this tender was declined, and an amended proof was sought to be put in, valuing the security at £2,000, but without assigning any ground for increased valuation. The trustee afterwards endeavoured, but without success, to obtain a statement of such grounds.

It appeared that the expediency of disputing Max Heilbut & Co.'s bond had been discussed at several meetings of the creditors, and it was suggested, on behalf of the trustee, that the reduction in the value of the security had been made with the object of preventing any such action.

Mason, for the applicant: The mistake in valuing the security was bona fide; the valuation should, therefore, be corrected under the provisions of secs. 11-13 of schedule 2 of the Insolvency Law. Sections 119-121 of the Law regulate the sale of property under bond, and if there be any conflict between the law and its schedules the former must prevail. Sec. 121 is applicable to the present case. [Gallwey, C.J.: Has it not been held in a decision under the corresponding section (No. 7) of Law 27, 1863, that this provision applies only to immovable property?] It is not so stated. The Rules framed under the Bankruptcy Act of 1869, show the intention of our Law where the security realises more than the value placed upon it.

Morcom, A.G., for the trustee: When a secured creditor has valued his security, and the trustee has tendered the amount of that valuation, the creditor cannot afterwards claim to amend his proof. Sections 119, 120 and part of 121 of our Insolvency Law, adopted from Law 27, 1863, apply only to immovable property, but even if they govern the present case, the proper course is for the creditor to file an objection to the trustee's account. The second schedule to the Bankruptcy Act of 1883 corresponds with the second

Schedule to our Insolvency Law. [He cited ex parte King, 1892. Dec. 6, 13, 14. in re Pailthorpe (20 Eq., 273), decided under the Bank-ruptcy Act of 1869, and the following cases under the Mamoojee Bankruptcy Act of 1883:—Ex parte Taylor, in re Lacy, 13 Amod & Co. Q.B.D., 128; Ex parte Arden, 14 Q.B.D., 121; Ex parte Norris, in re Sadler, 17 Q.B.D., 728.] These decisions show that an amended valuation can only be received before a tender of the original valuation; after such tender, there is no locus penetentioe. Bankruptcy Rules have to be construed strictly (in re Winslow, ex parte Godfrey) 16 Q.B.D., 696). The applicant has not acted bona fide. [He also cited Standard Bank v. Oakes, 1, N.L.R., 260; Fleischer's Trustee v. Maynard Bros., 5 Buch. E.D. Rep., 168.]

Mason, in reply, cited in re T.P. James, N.L.R., 1870, p. 128; Platt v. Escombe and another, N.L.R., 1879-80, 69; Van Rooyen v. Laatz, 8 N.L.R., 103.

GALLWEY, C.J.: This is an application for the amending of a proof of debt which has been filed in this estate. words of the Order prayed are "to amend the proof of debt" and not the "valuation," and the notice is insufficient in that respect, but I am not going fo restrict the

application to that.

This is an estate in which the greater portion of the available assets were situated in the South African Republic, and over these there was a notarial bond under which, however, the mortgagee had not possession. The Transvaal Courts, after a provisional trustee had been appointed in the Transvaal, removed him, and recognising the appointment of a Natal trustee, allowed the property to be administered in Natal. Therefore all property became vested in the trustee, since the mortgagee had not possession, as in Oake's case (vide supra). Six months after the trustee had been elected, the proof of debt in this estate was filed, and that proof was extremely particular as to the amount of the debt and the various bills of exchange representing it. I am asked to say that Mr. Heilbut, who verified the proof, made a mistake; an application is made to amend the proof of debt exactly 12 months after the proof had been admitted, and during which time the trustee had been allowed to deal with the assets under the bond, and after tender by the trustee to the applicant of the sum at which the assets under the bond were valued.

The first stage of these proceedings is the forwarding of an amended proof by Messrs Goodricke & Son, and when the trustee writes to Goodricke & Son asking for the reason of the amendment, that reason is absolutely refused. 1892. Dec. 6, 13, 14. In re Mamoojee Amod & Co. The trustee reiterates his request, and says that it is not due to curiosity, but gives the provisions of the Insolvency Law requiring cause of amendment to be shewn to satisfy him, and no answer is given to his letter.

In the application now before the Court to-day, there is exactly the same omission to say what is the mistake which is to be amended. Mr. Coake's affidavit, sworn on the 27th of August, 1892, avers that he prepared the proof of debt, that the security was valued by Max Heilbut at £1,000, and that such valuation and proof were made in good faith; but in the affidavit made by the applicant, on the 9th of November, 1892, he swears that when he made the proof of debt he knew that the value of the security was over £2,000, that he had always known its value had exceeded £2,000, and that he never intended ever to limit its value to £1,000 or allow it to be taken from him for Then, on December 12th, 1892, Mr. Coakes makes an affidavit, in which he says that as Maximilian Heilbut signed the proof of debt before him he came to the conclusion that he was fully aware of the contents and effect thereof, and I am left on these contradictory affidavits to find out what is the mistake that has occurred. proof had been made by an agent I should have had no hesitation in allowing the amendment of the value of the security, but in this case the proof was sworn to by the creditor himself, and was allowed to remain unaltered for 12 months. It is exactly the case of the will, which I mentioned during the argument, where two legacies had been left to one The testator instructed £10,000 to be left to one sister and £10,000 to the other, and this was in the abstract of instructions which the testator read. When the will itself was written out, the legacies were each put at £10,000 to the same sister, but the testator signed the will without reading it, and the Chancellor directed the will to be amended because the testator did not read what was actually written out and gave the legacy of £10,000 to one sister, bequeathed by the will to the other sister.

I think that in this case the trustee has acted with great propriety in not taking upon himself to say, as he was not furnished with any evidence that the proof was made upon a mistaken estimate, that he could amend the proof, and I support him in his refusal to allow the proof to be amended.

I should consider the case more closely if I thought that I had deprived the creditor of every means of redress; but, without expressing any definite opinion, it seems to me that the creditor may come to the Court and insist upon the trustee allowing him to have up to the extent of his

claim the proceeds of the property which were mortgaged to him. Even if the proceeds of the goods came to £4,000, the estate will be protected because of the provisions of the 15th section of the second schedule.

Dec. 6, 18, 14.

In re

In re Mamoojee Amod & Co.

I am not at all satisfied in this case as to the bona fides of the transaction, and I say that because of the proceedings which were taken in the South African Republic almost at the same time as the proof was sought to be amended; and in the proceedings there the whole of the facts were not disclosed.

I must refuse the application. The trustee will have his costs out of the estate.

I may say that, although I have thought it unnecessary to deal with the various points of law involved, it appears to me that the principles applicable to this case are well expressed in the case of in re *Dodds ex parts Vaughan's Executors* (25 Q.B.D., 529), especially as to the assent of the trustee to the creditor's valuation.

Per curiam: Application refused, without prejudice to any proceedings which the applicant may be hereafter advised to take. The trustee's costs to come out of the estate.

[Applicant's Attorneys: DILLON & LABISTOUR. Respondent's Attorney: W. Burne.]

ONGLEY v. ONGLEY.

1892. Dec. 14.

Divorce. Jurisdiction. Judge in Chambers.

Ongley v. Ongley.

A final order for divorce in default of restitution of conjugal rights cannot be made by a Judge in Chambers.

(In camera, before GALLWEY, C.J.)

Bale, for plaintiff, read affidavits to show that the defendant had not complied with a judgment of the Court, decreeing restitution of conjugal rights, in an action in which the plaintiff claimed the alternative of divorce.

1892. Dec. 14. GALLWEY, C.J.: Is this a matter for a Judge in Chambers?

Ongley v. Ongley. Bale: It is not excepted by Law 7, 1877.

GALLWEY, C.J.: The order asked for would be that of a decree of divorce a vinculo matrimonii, and it must be made by the full Court.

[Plaintiff's Attorneys: Bale & Greene.]

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The Weenen County Election Petition.

- [In the Court for the trial of Election Petitions, held at Estcourt, on the 27th and 28th October, 1892, before Wragg, J.]
- In re Frederick Robert Moor (Petitioner) v. Henry Vaughan and Theodore Woods (Respondents). The Weenen County Election Patition.
- Election Petition. Law 16, 1883. Ballot Law, 1886 (No. 29. 1887). Irregularity invalidating ballot paper. Number identifying voter. Evidence. Costs.
- Election and proceedings held to be null and void where 114 ballot papers had been marked on the back by the polling officer with the written electoral number of the voter, thus affecting the result of the election. The seats of the candidates returned by the counting of such votes declared vacant.
- On the trial of an election petition founded on the abovementioned irregularity, the voters' roll held to be admissible as evidence.
- The presiding officer at an election is not privileged as to giving evidence at an election petition trial in respect of occurences at the election.

Where an election had been declared null and roid by reason Oct. 27 and 28. of a mistake on the part of the polling officer, there being no misconduct by either party, each party ordered to bear his own costs of the election petition proceedings.

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This was the trial of an election petition, the grounds of which are sufficiently indicated in the judgment afterwards delivered.

Greene, with him Mason, for the petitioner.

Laughton, for the respondents.

Postea: November 8th, 1892.

The following judgment was delivered:—

At the election of members of the Legislative Council, for the County of Weenen, held on the 26th day of September last, there were four candidates, F. R. Moor, G. M. Sutton, Lieut.-Col. Vaughan, and Theodore Woods. returning officer for the said County publicly announced, and made return, that Lieut.-Col. Vaughan and Theodore Woods had been elected. The total number of votes given to each candidate was announced to be as follows:

LieutCol. Vaughan	 	165 votes
Theodore Woods	 	161 <i>"</i>
F. R. Moor	 	158 "
G. M. Sutton	 	153 ".

Against such election and return the defeated candidate, Moor, presented to the Legislative Council, through the Speaker, a petition in terms of our Law No. 16 of 1883, and that petition under the procedure of the said law was tried by me, being the Election Petitions Judge for the year, at Estcourt within the district wherein the disputed election was held: the trial commenced on October 27th and was concluded on the following day. Messieurs E. M. Greene and A. W. Mason were counsel for the petitioner, and Mr. F. A. Laughton conducted the case for the respondents.

The petitioner objects to the election and the returning officer's return upon the following special grounds:-

"That the presiding officer at Weston, in the said county, marked upon certain ballot papers the electoral number of each elector who voted at such polling station."

"That the total number of ballot papers so marked was 111 or thereabouts."

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"That the returning officer for the said county, notwithstanding that the said ballot papers were so marked, failed or neglected to reject the same, as he should have done on the ground that the voters who used such ballot papers could be identified by such writing or mark."

"That if the ballot papers referred to in Clauses 6, 7, 8, hereof had been rejected, your petitioner and the said George Morris Sutton would have been duly elected as members of the Legislative Council to serve for the said County of Weenen."

"That your petitioner believes that he and the said George Morris Sutton had the majority of legal votes in

the said election."

Thereupon the petitioner, averring that the election was not conducted in accordance with the principles laid down in the body of the Ballot Law of 1886, and that such noncompliance or mistake affected the result of the election, and prevented the return to the Legislative Council as members thereof of himself and the said G. M. Sutton, asks-

That the said election and return be declared invalid and that the petitioner and G. M. Sutton be declared to have been duly elected:

Or, that the said election and all proceedings connected therewith be declared null and void, and that the said

seats be declared vacant:

Or, that the said return may be amended by the rejection of the ballot papers, on the back of which the electoral number of each voting elector was marked, and that upon the majority of votes, thereby found to have been given for petitioner and G. M. Sutton, they may be returned and declared duly elected as members for Weenen

Or, that, upon scrutiny of all ballot papers received at the said election, the return of the returning officer may be

amended or a new return ordered to be made.

In the interval between presenting the petition and the trial, the counted ballot papers were, on application and under my order, inspected by counsel representing parties in presence of the Registrar of the Supreme Court and the

Chief Clerk of the Colonial Secretary's Office.

At an early stage in the proceedings at the trial, the learned counsel, who appeared for the respondents, took certain objections to the admissibility of the evidence, which I should not notice in extenso did I not deem it, if not necessary, at least desirable to do so, inasmuch as this is the first case under our Election Petitions Law of 1883 and our Ballot Law of 1887, and the procedure adopted

herein may perhaps be considered as a precedent in future

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The first objection, which the learned counsel supported with much ability, was as to the admissibility of the voters' list. He relied, chiefly, upon the dicta of Mr. Justice Field tion Petition. in the Stepney case (4 O'Malley and Hardcastle, pt. 3, p. 34), which was heard before Field, J., and Denman, J., in February, 1886, and contended that a ballot paper, sought to be rejected because it contains on its back matter by which the voter can be identified, must be taken by itself and that it is not competent, by means of evidence dehors such paper, to prove the identification. words, with reference to the present case, it was contended that it was not competent for the petitioner to prove, by the voters' list, that the numbers improperly written on the backs of the 114 Weston papers are the numbers appearing in the voters' list opposite the names of the electors specified therein. Now, it at once appeared to me to be manifest that, were I to hold that such contention was sound, I should be doing much to defeat the ends which our Election Petitions Law and our Ballot Law have most clearly in view, and that I should all but paralyse every endeavour, by anyone aggrieved under the second section of our Ballot Law, to obtain redress. Such result would be most undesirable, and I am therefore the more satisfied when I find that a close scrutiny of Mr. Justice Field's words do not really establish the position for which the learned counsel contended. In this Stepney case, inter alia, a ballot paper was objected to by the respondent on the ground that on the back of it, just above the official mark, there was a cross, and the name "John Mitchett," The report says, "the name 'John Mitchett' did not appear upon the register of voters." I expressed the opinion that the case was not so fully reported as it might have been, nevertheless it is sufficient, to my mind, to show that it will not support the argument put before me by the learned counsel. In the first place, Mr. Justice Field says, "it is from the mark itself, or from the writing, that the identification must be made out." Now, as to the writing, it is manifest that the evidence of identity must come from some person in the witness box. Then, secondly, Mr. Justice Field must have had the register, that is, the voters' list, in Court, and must himself have inspected it, because he says, "I am unable to find that there is any 'John Mitchett' on the register at all; and, in fact, I do not know whether there is such a man in the world. If there had been a man of that name on the register, it would have been one step towards forming some conclusion, but there

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is no such name on the register, and therefore that step is wanting. Now not the slightest trace is given to me of any mode by which this can be done. If there were any evidence here—I do not mean strict evidence—but something leading me to suppose that this name had been written by the voter, or if this writing suggested who the voter was, it would have made a great difference, and I should consider that would fill up the meaning of the Act." It is clear from the words from the above and reporter's synopsis, on the top of page 40, that Mr. Justice Field had done that which the learned counsel contended that I ought not to do, namely, had admitted the register of voters, that is the voters' list, in evidence of identification of the voter who had so written "John Mitchett" on the back of the ballot paper. It was not because of the inadmissibility of the register that the learned Judge held the vote to be good, but because, when admitted, it did not contain the name of "John Mitchett." There was no evidence before him that there was such a man in existence. there were no means, by the production of the register, or by proof of the handwriting, by which the vote could be identified, and so Mr. Justice Field held the vote to be But Mr. Justice Denman, who sat with Field, J., at the hearing of the Stepney case, strongly dissented from his colleague's view. He said: "I have a strong opinion here that this case is absolutely concluded by the case of Woodward v. Sarsons, which is binding upon this Court. Now I take the decision of Woodward v. Sarsons to amount to this, not that every departure from a simple cross is a mark by which the voter can be identified—a double cross for instance was allowed by the Court—but that where the name of the candidate, not of the voter, is written in full upon the ballot paper, the vote shall be invalid, because it is a mark by which the voter can be identified. The principle is this: that where a man has once written a name in full upon a paper it is evidence of his handwriting, and evidence of his handwriting is evidence of the identity of the man. It is also held that where a man marks the proper mark on his ballot paper—if he puts his initials by the side of that mark—that, upon the same principle, is evidence by which the voter can be identified, and in the present case, it appears to me, that principle applies. the only difference between that case and the present would be that this is a mark upon the back of the paper, those were marks made on the face, and one migh conceive a difference upon that ground; but when the words of are section are read, it seems to me that those words h^{88} inconsistent with that interpretation, for the section

reference to the back of the ballot paper as well as the The interpretation placed upon this section by the Court was not a mark by which the particular voter can be proved to be the man and identified, but the sort of mark by which the voter can be identified, that is to say, a mark which is made in such a way as to afford a reasonable possibility of identifying him. I take it that the real object of the statute is to prevent people agreeing beforehand to something in the nature of a signature by which it may be known afterwards which were their ballot papers. I do not say how I should have decided this case if there had not been this previous decision; but I do not look upon this as an open question after the case of Woodward v. Sarsons. cannot distinguish this case from that, and therefore I give judgment against this vote, but, inasmuch as the Court is divided in opinion, the vote stands." And, after Denman, J., had so delivered judgment, Field, J., at once added, "My difficulty in this case is to connect 'John Mitchett' with the cross, so as to identify the vote."

If we turn to the Buckrose Division case (4 O'Malley and Hardcastle, pt. 4, p. 110) heard in December 1886, we find that it does not help the argument of the learned counsel. In that case, inter alia, a vote was objected to on the ground that the figure 33 had been written on the back of the ballot paper. I quote from the reports, "The Court, in the absence of any evidence showing that the votes could be identified by the writing, allowed the vote, following the decision of Mr. Justice Field in the Stepney case." It is on account of the absence of all evidence as to identification of the voter and not the inadmissibility of any such evidence tendered, that the vote was held to be good.

It is, however, in Woodward v. Sarsons, (10 L.R., C.P., p. 733) that we find the strongest authority against the learned counsel's argument. That case was determined in July, 1875, on a case stated by Lush, J., by Brett, Archibald, and Denman, J.J., the judgment being read by Coleridge, C. J. It appeared that, "upon an elector attending to vote, and applying for a ballot paper at polling station No. 130, the presiding officer, J. B. Smith, first marked upon the face of the ballot paper the number of such voter appearing on the burgess roll, and then delivered the same out so marked to the voter as that being a ballot paper to be used by him; and the same was accordingly used by him for the purpose of voting. course the presiding officer followed in every case of a ballot paper used or attempted to be used at the polling station No. 130, at the said election. The returning officer, John Sadler, was not aware of this being done, or having

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uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible by seeing the paper itself or by reference to other available facts, to identify the way in which he has voted. If these requirements are not substantially fulfilled, the tior Petition. ballot paper is void and should not be counted, and, if it is counted, it should be struck out on a scrutiny. Applying these views to the votes in question before us, it is clear that the 294 ballot papers marked by the presiding officer at the polling station No. 130 were void, and ought not to be counted. There was a mark on them by which, on reference to the burgess roll, the way in which the voter had voted could be identified."

In the Wigtown case, decided in April, 1874, (2 O'Malley and Hardcastle, p. 215) Lord Ormidale said, "The construction which I am disposed to put on the statute (Ballot Act, 1872, sch. 2. Form of directions for guidance of voters enacts that "if the voter places any mark upon the paper by which he may be afterwards identified his ballot paper will be void, and will not be counted.") is that this name which has been written on the ballot paper might lead to the identification of the voter. It should have been enough that there was a name put on the voting paper which might lead to the identification of the voter after-Therefore I must sustain the objection."

It is needless, I think, that I should further consider this first objection.

The second objection taken was as to the evidence of the presiding officer at the Weston polling station, and it was contended that he ought not to be called upon to disclose what took place at his polling station, on the polling day, because that would amount to a disclosure of State secrets. I am not aware that State secrets are of this description. am aware that is absolutely necessary that, at such election enquiries as this present one, a presiding officer should state to the Court exactly what took place in his presence or what he himself did on the polling day with reference to The reported cases clearly ballot papers under discussion. show this. Moreover, the witness himself claimed no such privilege. On the contrary, he was most anxious to give an explanation of his conduct.

The third objection was that this presiding officer ought not to be asked questions about the writing of the electoral numbers on the backs of the 114 ballot papers because his answers might tend to criminate himself. In England, however, under Section 33 of 31 and 32 Vict. c. 125, such privilege has been taken away from witnesses at election trials, such witnesses, on answering every question, being

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Before passing from the question of procedure, it is, I think, desirable that I should refer to Section 11 of our Ballot Law. That section reads thus, "No person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted." The construction which I place thereon is, not that a witness shall not be asked for whom he has voted, but that he shall not be compelled to answer. If a witness do not object and if he desire to give such information, I see no reason why he should be prevented. During this enquiry, more than one witness was asked how he voted by the learned counsel for the respondents.

The facts, which I find to have been proved or admitted

at the trial, are these which follow.

The returning officer, appointed by the Governor under Section 19 of our Ballot Law 29 of 1887, for the electoral district of Weenen, was the Resident Magistrate at Estcourt, and he, under the 7th Section of that law and the 4th Clause of the First Schedule attached to the said law, appointed J. H. Bartholomew as presiding officer at the polling station at Weston within the said electoral district. At the Weston polling station 115 electors voted on the 26th September, and to each of those electors the presiding officer handed a ballot paper, on which he wrote the electoral number appearing opposite the name of each such voter on the voters' list; his polling clerk, Matthews, at the same time ticked off, on that voters' list, the number and name of each such voter. The presiding officer did this in full sight of the two agents of the candidates without any objection being raised by them. The voters, who received such marked ballot papers, did not object, with one exception: that voter gave evidence at the trial. He, with reference to the paper handed to him, demurred to the procedure adopted by the presiding officer, in somewhat forcible language, and he was so disgusted at the open breach of the principle of secrecy, enjoined by the Ballot Law, that he refused to go into the little compartment provided for voting purposes under the 8th Clause of the First Schedule, and instead, with the words, "This is how I am going to vote; you may as well know now as later on," he placed the ballot paper on the top of the ballot box, and, having marked it in sight of the presiding

officer, handed it, unfolded, to him, and told him to himself put it in the ballot box; he then went outside, and complained to persons, standing there, of the violation of the principle of secrecy. At the close of the poll at Weston in the afternoon of the 26th September, the presiding officer tion Petition. sealed up the ballot box and forwarded it to the returning officer at Estcourt, which is distant from Weston about 20 Next day, September 27th, the returning officer at Estcourt proceeded to count all the ballot papers which had been forwarded to him from the several polling stations; at such counting there were present the returning officer, Sergt. George, of the Natal Mounted Police, the European messenger of the Resident Magistrate's Court, two scrutineers on behalf of Messrs. Moor and Sutton, and one scrutineer on behalf of Col. Vaughan and Mr. Woods. The evidence does not show whether the scrutineers took the oath of secrecy, but Sergt. George and Nunn (the messenger) certainly did not, before such counting or even during it, make the statutory declaration of secrecy required by the 36th Clause of the First Schedule attached Sergt. George, and not the returning to the Ballot Law. officer as the 3rd Section of the Ballot Law and the 17th Clause of the First Schedule contemplate, opened each ballot box, took out the papers, some folded simply and some twice doubled, and, unfolding each one, handed them so to the returning officer. The paper account of each presiding officer was verified by the numbers of the papers actually in the ballot box sent by him, and then all the papers, still unfolded, were mixed together in one tin box by Sergt. George, and from that tin box the Sergeant took them one by one and handed them to the returning officer for the purpose of counting the votes. When Sergt. George first took out the folded papers from each ballot box, for the purpose of verification by means of each presiding officer's paper account, he was alarmed when he observed some ballot papers which had on their backs a written number in addition to a printed number. after they had been mixed in the tin box, unfolded, and some lying face downwards, the Sergeant drew out the first paper so marked on the back, his feeling of alarm developed into action. His words are, "I knew that, according to the law, there should be nothing written on the back of the ballot paper, and I thought that it was my duty to call the attention of the returning officer to the marking of those ballot papers whose backs I saw, and so it was that I turned one paper before him face downwards, and was going to speak, when he stopped me. . . . My hand was so, on the number, when I so placed the one paper on

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the table before the returning officer. The returning officer said, 'You must not do that. You must hand them to me face upwards." Thereupon, Sergeant George handed each paper back downwards, and the returning officer, neither himself looking at the back, nor permitting the scrutineers to do so, proceeded with the counting of the papers, which, as they were counted, were placed in another box without regard to their position, back or face When about half of the mixed papers had been upwards. so counted, one of the scrutineers made a mistake in the counting, and it became necessary to recount the votes on the papers already counted. For the purposes of such recounting Nunn, the messenger, took out those papers, and as he did so he also observed, on the backs of some, written numbers in addition to the printed numbers. Both Sergeant George and Nunn knew the significance of such Each testifies that, if he had had a written numbers. voters' list in his hand, he could have identified the voters, and could have discovered the way in which each elector voted.

The counting of the votes was concluded by the returning officer, and the public declaration of the poll was made by him about 5 p.m. in the afternoon of the 27th September. On the next day, the 28th, he made the return to the Colonial Secretary. On the following day, the 29th, the returning officer, having heard rumours, which he decribes as "general gossip," about the presiding officer's action at Weston, reopened the box containing the counted ballot papers, and, in the presence of the European messenger, examined the backs thereof. He then found that all the 115 voting papers, placed in the ballot box at Weston, including one which he had rejected because on the face of it the voter had placed three crosses, were marked on the back with the electoral number of each voter. On the next day, September 30th, he reported his discovery to the Colonial Secretary, and asked what was to be done, and if the election was invalidated by the mistake of the Weston presiding officer. It does not appear that any instructions were sent.

The returning officer forwarded the ballot papers to the Colonial Secretary about a week after his report of the 30th September, and during that interval the ballot papers were not in sealed packets, but "under lock and key."

The 115 ballot papers, with the electoral numbers written on the back, were produced at the trial, and were duly counted and inspected. On one such paper a cross had been placed by the voter opposite the name of three candidates. The returning officer did not observe the written

number on the back, but had rightly rejected this paper on the ground that it contained on its face more than two Here again the returning officer made a mistake, in marking this rejected paper on its face and not on the back. The 19th Clause of the First Schedule directs the tion Petition. returning officer to endorse "rejected" on any ballot paper which he may reject as invalid, and, surely, such endorsement should be made on the back, in dorso, of the paper, and, for the future guidance of returning officers, I hereby place this judicial interpretation on the word endorse in the said 19th Clause of the First Schedule.

The analysis of the votes on the 114 papers, marked with the electoral numbers on the back, shows that there were therein

> 77 votes for Vaughan. 77 Woods. " 37 Moor. ,, ,, 86 Sutton.

If these votes had been rejected under the second section of the Ballot Law, the return, which the returning officer would have been obliged to make, would have been :-

121	votes	for	Moor	(158 - 37).
117	,,	,,	Sutton	(153 - 36).
88	,,	"	Vaughan	(165 - 77).
84	••	••	Woods	(161 - 77).

In other words, Moor and Sutton, in place of being returned as defeated by the small number of votes of three and eight respectively, would have been returned as members by the large majority of 33 and 29 respectively.

The first question which I have to decide is, were the votes on the 114 ballot papers, which contained the electoral numbers on the back, rightly counted by the returning officer, or were they absolutely void under the second section of the Ballot Law?

The history of the mistakes has been given as above. The presiding officer at Weston had acted as polling clerk at a previous election, and on this occasion was appointed as presiding officer in consequence of an accident which had happened to the Fieldcornet of the ward. admitted that he had read Section 2 of the law, but explained how he was misled by the marginal instruction opposite the form of ballot paper, which is given in the Second Schedule. The words on the margin are: "Note.— The counterfoil is to have a number to correspond with that on the ballot paper." The presiding officer said that he did not know that the note referred only to the printed

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number, and, thinking that it applied to the electoral number, he wrote on the back of each of the 115 ballot papers, given by him to the voters, the electoral number which each voter had on the voters' list. I have no reason to doubt the bona fides of the presiding officer, in fact I am of opinion that he made the mistake in the way described. But the bona fides of the presiding officer will not make such papers good, if that which he wrote on the backs thereof was matter from which the voters could be identified.

So also with reference to the returning officer. He did not, when in the witness box, attempt to convey the idea that it would have been his duty to count the votes on these papers if he had observed their marked backs. His explanation of their non-rejection is that he himself did not see the backs, and that he took every possible means to prevent the scrutineers from observing the backs. He said that, although he saw a conflict between the Second Section of the Ballot Law and "The Instructions to Returning Officers" issued for their guidance by Government, he considered himself bound by the latter, which he took as practically prohibiting him from looking at the backs of the ballot papers to see if they contravened the Second Section of the Law. He further said that he had adopted the same procedure at a previous election.

It is matter for deep regret that the returning officer should have taken this view of instructions, which are purely departmental, and meant only to assist him, but which, if in conflict with the Ballot Law, ought not to have accorded to them a feather's weight of consideration. But, the words of the clause of the instructions, which he considered to be binding on him, run thus:—"Thirdly. Throughout the counting keep the papers with their faces upwards, as much as possible, so that the numbers on the back cannot be seen." A careful reading of these words shows, I think, that there is no real conflict between them and the Second Section of the Ballot Law. "The numbers on the back" are, of course, the printed numbers corresponding with those on the face of the counterfoils, and these printed numbers the returning officer is to keep as much as possible from being seen. The words "as much as possible" mean consistently with the Second Section of the Law, whereby any ballot paper, not having on its back the official mark, or which has on its back, except the said (printed) number, anything written or marked by which the voter can be identified, is rendered void and not to be In order to know whether there is anything counted. written or marked on the back, other than the printed number, whereby the voter can be identified, it is absolutely

necessary that there should be some inspection of the back by the returning officer, and the merest glance at the back would enable him to observe whether such forbidden matter was thereon. The present case illustrates how, without any scrutiny of the back, the returning officer tion Petition. entirely disables himself from giving that absolute obedience which the clear and precise words of the 2nd Similarly, the agents of Section of the Law command. the candidates have a right to know whether forbidden matter is on the back of the ballot papers, otherwise they cannot make objections in terms of the 19th clause of the first schedule of the Law, by which clause the returning officer is to add to the endorsement "rejected" the words "rejection objected to," if an objection be in fact made by any agent to his decision. I do not mean that the ballot paper is to be handed to such agents, or that they are to be allowed to write down what may be on the back of such paper, but they ought to have some means of observing whether there be on the back more than the printed number and the official mark, and it would be exceedingly easy, I think, for the returning officer, when permitting the agents to glance at the back, to keep his fingers on the printed number at the back. I readily accept the explanation of the returning officer, who states that his procedure on this occasion was exactly similar to that at a But, just as the bona fide mistake of the former election. presiding officer will not render valid a ballot paper which has on its back matter forbidden by the Second Section of the Law, so the bona fide mistake of the returning officer in counting papers, absolutely rendered void by the said section, will not confer validity upon such counting.

It becomes my duty to strike from the returned numbers of votes, given to each of the four candidates, such votes as ought not to have been counted if the commands of the Second Section had been obeyed by the returning officer. Those votes are contained in the 114 ballot papers on whose backs the presiding officer at Weston wrote certain num-Those numbers were, as he admits, the numbers which the electors, receiving the papers for voting purposes, bore on the voters' list. The handwriting of the presiding officer was known to, and was recognised by, the returning officer at the second scrutiny. Sergt. George and Nunn knew at once what the numbers were and they have testified that, with the voters' list in their hands, they could have identified each voter and could have discovered how he voted. It is clear, and I so find, that each of these 114 papers is marked on the back with the written electoral number of the voter who received it for voting purposes.

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77 votes for Vaughan.
77 ,, ,, Woods.
37 ,, ,, Moor.
36 ,, ,, Sutton.

In order to find the number of votes rightly and legally counted by the returning officer, it is necessary to substract those votes from the published number of votes obtained by each candidate, and, as the arithmetical addition of such votes by the returning officer was not challenged before me at the trial, I assume that the published figures are correct in point of addition. I find, therefore, that the return, which the returning officer ought in law to have made, was this:—

121 votes for Moor. 117 ,. ,, Sutton. 88 ,, ,, Vaughan. 84 Woods.

It is now for me to decide whether I should declare Messrs. Moor and Sutton to have been lawfully elected or whether I should declare that the election and all the proceedings connected therewith are null and void and that the two seats, to which Messrs. Vaughan and Woods were wrongly returned, are vacant. Of 115 persons, who voted at Weston, all but one have been disfranchised on account of the mistake of the presiding officer. ber of actual voters in the whole electoral district of Weenen County was 322, of whom so large a portion as 115 have been thus deprived of the privilege of voting for the candidates of their choice. I find that they have been deprived of such privilege by reason that the election was not conducted in accordance with the principles laid down in the body of our Ballot Law, No. 29 of 1887, and I further find that, by reason of non-compliance with essential principles of the Ballot Law, the result has been affected. I understood from the address of the learned counsel, who conducted the case for the petitioner, that the petitioner is content that there should be a new election, rather than that he and his colleague should, in the circumstances, be declared elected.

I find, therefore, formally, that the election for the Oct. 27 and 28. County of Weenen, held on September the 26th, 1892, and all the proceedings connected therewith are null and void, and that the seats of the respondents, Lieut.-Col. Vaughan County E lecand Theodore Woods, wrongly returned at such election, tion Petition. are vacant.

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As to costs. It is contended on behalf of petitioner that the respondents ought to bear the costs of these proceedings, inasmuch as, although advised of the exact state of matters by means of the scrutiny of the counted papers which they obtained under my order, yet they have persisted in defending their seats. On behalf of the respondents, it is submitted that they were not parties to any irregularities under the Law, and that not even the voters were responsible for any wrongful acts, but that the persons, who acted in contravention of the Ballot Law, were officials over whom they had not control. refuse to recognise the force of this reasoning of the respondents. As far as I know, serious irregularities, such as those which have come to light in this case, appear for the first time. This is the first election petition which has been tried under our Laws No. 16 of 1883 and 29 of 1887. and I can well understand that, inasmuch as it was a matter of public interest that there should be a formal judicial decision on the peculiar circumstances of the case, the respondents felt it to be their duty not to resign their seats in the Legislative Council but to defend the same. Therefore, although my judgment is against the respondents, I am not disposed to cast them in costs. The words of Lord Ormidale in the Wigtown case (2 O'Malley and Hardcastle, p. 230) strongly commend themselves to my mind:—"The general rule undoubtedly is that the successful party gets his expenses, but there is as little doubt that in many cases the Court does not give costs to the successful party, even although it cannot be said against him that he has been guilty of misconduct in carrying on In reality the question of costs is held to the litigation. be in the discretion of the Court. Here it is not suggested that there was any misconduct on either side, either at the election or in the litigation under the present petition. must be assumed that the returning officer, in dealing with the voting papers, acted proprio motu, without any suggestion on the part of the respondent, and if so, that principle on which the Court proceeded in the Athlone case, to which I have been referred, comes to be of importance. principle there acted upon was that, as there was no misconduct by either party, each party should bear their own Now, that principle arises here exactly, and is 1892. Oct. 27 and 28. Nov. 8.

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equally applicable. It does not appear that the errors in the ballot papers were caused or suggested by the respondents. It is, no doubt, a misfortune that these errors should have arisen, and that in consequence the parties should have been subjected to, it may be, a good deal of expense, but, having regard to the principle which I think must recommend itself to any Court exercising its discretion in the matter of costs, I do not think I can do otherwise than follow the Athlone case as an example, though not a binding rule. I therefore hold that in this case each party must bear his own costs."

As I have said, these words of Lord Ormidale commend themselves to my mind, and I make a similar order in this case. My order is that each party do bear his own costs.

[Petitioner's Attorneys: Hathorn & Mason. Respondents' Attorneys: Laughton & Tatham.]

1892. October 31. Nov. 1, 2, 28. [In the Court for the Trial of Election Petitions, Held at Dundee.]

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in to Frederick Augustus Robert Johnstone and others (Petitioners) v. Richard Allan Greene and Gert Thomas Van Rooven (Respondents).

Election petition. Irregularities in election proceedings.

Marks on ballot papers. Identification of voter. Invalid votes. Ballot Law, 1886. Election Petitions Law, 1883. Legislative Council. Charter of 1856. Disqualification of Member. Subject of Foreign State. "The Naturalization Act, 1870" (33 and 34 Vic., cap. 14).

Election and proceedings connected therewith declared to be null and void and seats declared to be vacant, on the ground of the marking of ballot-papers with the written electoral numbers of the voters, and of other irregularities in the proceedings, being a noncompliance with essential principles of the Ballot Law and affecting the result of the election.

A natural-born British subject had continuously, except in certain brief periods, resided in the Orange Free State Nov. 1, 2, 28. since 1867, had twice been enrolled as a Justice of the The Newcastle Peace after taking an oath of allegiance to that State, tion. and had exercised therein the rights and been subject to the obligations of a Burgher.

Held: That such person having voluntarily become naturalised in a foreign State had, after the passing of the Imperial Naturalization Act, 1870, ceased to be a British subject; and, not having been naturalised in Natal, was an alien in this Colony within the meaning of the term in sec. 12 of the Charter of 1856, and was thus ineligible as a member of the Natal Legislative Council. Further, that, if it were conceded that, he had been duly elected, his seat had become vacant in terms of sec. 18 of that Charter.

This was a trial of a petition of F. A. R. Johnstone, John Parks and George Charles Willson against the return of Richard Allan Green and Gert Thomas Van Rooyen, as Members of the Legislative Council of Natal for the Newcastle Electoral Division, at the election held on the 27th September, 1892.

The facts will appear in the judgment afterwards delivered.

Escombe, (with him Mason) for petitioners.

Respondents in person.

Judgment reserved.

Postea, Nov. 28, 1892.

The following judgment was delivered:

Wragg, J.: The election of members of the Legislative Council, for the Electorial Division of Newcastle, was held on the 27th day of September last. There were four candidates-F. A. R. Johnstone, R. A. Green, J. Parks, and G. T. Van Rooyen. The returning officer for the said division publicly announced, and thereafter made return, that R. A. Green and G. T. Van Rooyen had been elected. The total number of votes given to each candidate was announced to be as followos:—

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R. A. Green	•••	168 votes
G. T. Van Rooyen	•••	157 "
F. A. R. Johnstone	•••	151 ,,
J. Parks	•••	145 "

Against such election and return the defeated candidates, Johnstone and Parks, and G. C. Willson, an elector of Dundee, which is within the said electoral division, presented to the Legislative Council, through the Speaker, a petition in terms of our Law No. 16 of 1883, and that petition, under the procedure of the said law, was tried by me at Dundee. The trial commenced on October 31st, and was concluded on November 2nd. Messrs. H. Escombe and A. W. Mason were counsel for the petitioners; the respondents conducted their own case.

The petitioners object to the election and the returning officer's return upon the following special grounds:—

- "That the presiding officer at Dundee and Helpmakaar, in the said electoral division, marked upon certain ballot papers the electoral number of each elector who voted at their respective polling stations.
- "That the total number of ballot papers so marked was 177 or thereabouts.
- "That the returning officer for the said electoral division, notwithstanding objection made at the time by the petitioners, Johnstone and Parks, rejected all the said ballot papers so marked on the ground that the said voters could be identified by such writing or mark.
- "That the said returning officer failed or omitted to endorse, at the time of counting, on each of the said ballot papers, the word 'rejected' and the words 'rejection objected to.'
- "That but for the rejection of the said ballot papers, the two petitioners, Johnstone and Parks, or one or other of them, would have been duly elected.
- "That the said returning officer did not, so far as practicable, proceed continuously with the counting of the votes between the hours of nine o'clock in the morning and seven o'clock in the evening, but on the contrary, on the 28th day of September, 1892, the day upon which the said votes were counted, did, for a period of two hours or thereabouts, during the time aforesaid, suspend the counting of the said votes for the purpose mentioned in the next succeeding paragraph.

"That the said returning officer referred the question of the validity of the ballot papers, referred to in the Nov. 1, 2, 28. above paragraphs, to the Honourable the Attorney-General for his advice or instructions thereon, and Election Petireceived such advice or instructions, and acted in tion. accordance therewith by rejecting said ballot papers.

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- "That the said returning officer, while counting and recording the number of ballot papers and counting the votes, did not keep the ballot papers with their faces upwards, and did not take proper precautions for preventing persons from seeing the numbers printed on the back of such papers, and the backs of such ballot papers and the marks thereon or some of them were seen by persons other than the returning officer.
- "That the returning officer, as the petitioners verily believe, opened the sealed packet of counterfoils and inspected the same, and identified, or could have identified, the votes."

The petitioners aver that the said election was not conducted in accordance with the principles laid down in the body of the Ballot Law, 1886, and that such non-compliance or mistake effected the result of the election, and prevented the return to the Legislative Council, as members thereof, of the petitioners, Johnstone and Parks, and they pray—

- That the said election and return of R. A. Green and G. T. Van Rooyen be declared invalid, and that their seats may be declared vacated, and the petitioners, F. A. R. Johnstone and J. Parks, or one or other of them, be declared to have been duly elected or returned as members for the said electoral division:
- Or, that the said election and all proceedings connected therewith be declared null and void, and that the said seats be declared vacant:
- Or, that the said return may be amended by the counting of the said ballot papers referred to in paragraph 8, and that, upon a majority of the votes being found to have been given for F. A. R. Johnstone and J. Parks, they or one or the other of them may be declared duly elected, and may be returned as members for the said electoral division:
- Or, that, upon scrutiny of all ballot papers received at the said election, the return of the returning officer may be amended or a new return ordered to be made.

With reference to the first respondent, R. A. Green, there is a special alternative averment in these words:

1892. October 31. Nov. 1, 2. 28. The Newcastle Election Petition. Should the aforesaid objections be held insufficient to support the prayer of this petition, the petitioners further say 'that the said Richard Allan Green was, prior to and at the date of the said election and still is, a subject, citizen, or burgher of the Orange Free State, and was then and still is enrolled on the burgher roll of the ward Vrede in the district of Harrismith in the said State, and prior to and since the said election has concurred in or adopted an act whereby he became and still is a subject, citizen, or burgher of the said Orange Free State.'"

Upon proof of this alternative averment the petioners pray, alternatively, that the seat of the said Richard Allan Green may be declared vacant, and that F. A. R. Johnstone or J. Parks may be adjudged and declared to have been duly elected to such vacant seat, or otherwise that a fresh election be ordered in respect of the said vacant seat.

In the interval between presenting the petition and the trial, the counted ballot papers, as well as the rejected ballot papers, were, on application and under my order, inspected by counsel representing parties in presence of the Registrar of the Supreme Court and the Chief Clerk of the Colonial Secretary's office.

The procedure at the trial was almost identical with that adopted, four days previously, at the trial of the Weenen County Election Petition. In this case, however, there was an element not present in the Weenen case, namely, the question of the alienage of the first respondent, Green. In order to avoid confusion, and to keep, as much as was possible, the main issues in the case distinct from the alternative question affecting the first respondent only, it was arranged that Mr. Escombe should open the petitioners' case generally, and should then lead evidence as to the main portion of the case; that Mr. Mason should then open the petitioners' special case on the alternative averment against the first respondent, and should lead evidence thereon; then, the respondents were to open and conduct their case on the main points, and Mr. Green, the first respondent, was to present his own case on the special averment against himself; finally, Mr. Mason was to address the Court on the special case against the first respondent, Mr. Escombe was to conclude on the whole case, and the respondents were to separately address the Court, the second respondent on the main case, and the first respondent on the whole case against himself.

Documents were admitted in evidence and oral evidence was adduced on the same principles and under the same

rules as those followed in the Weenen case. Parties were content with my rulings thereon, and, inasmuch as in the Nov. 1, 2, 28. Weenen case I have dealt at length with the admissibility of such evidence, it is quite unnecessary that I should here make further remarks thereon.

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I now proceed to the facts which, on the main issues, I

find to have been proved or admitted at the trial.

The returning officer, appointed by the Governor under Section 19 of our Ballott Law, No. 29 of 1887, for the electorial division of Newcastle, was the Resident Magistrate at Newcastle, and he, under the 7th section of that law and the 4th clause of the First Schedule attached thereto, appointed W. Craighead Smith as presiding officer at the polling station at Dundee within the said electoral division. A presiding officer was also appointed by him for the poll-

ing station at Helpmakaar.

The electors at Dundee and Helpmakaar voted on the 27th September, and to each one of those who actually voted was issued a ballot paper whereon the presiding officer wrote the electoral number borne by each on the voters' list. Those electoral numbers were written thereon in sight of the agents appointed by the candidates, and some of them in presence of the candidate Johnstone. The presiding officer at Dundee had acted in the same capacity at an election two years before the present one, but at the trial he was unable to say whether on the former occasion he adopted the procedure which is the main reason why this petition has been presented. No objection was taken by the agents of the candidates, by the candidate Johnstone, or by the voters themselves. But one of the latter, about 3.30 in the afternoon, when he observed the presiding officer writing his electoral number on the ballot paper, asked a question, to which the presiding officer thus referred in his evidence: "He (the voter) asked 'Do you number the papers?' and I said 'Yes.' He then said, 'I voted at Ladysmith yesterday, and I don't think that they marked the papers there.' I said, 'Are you quite certain of that?' and he said, 'No, I will not be positive.' I said that I thought that I was acting in accordance with the memorandum on the ballot paper; I looked at Edmonstone and Augustus Tatham, agents for candidates, and they nodded—I took it that they nodded and I took it that they agreed that I was quite right."

The ballot papers were duly forwarded to the returning officer at Newcastle, who proceeded to count the votes on the following day, September 28th, at 10.30 a.m., in the Court House at Newcastle. At such counting there were present with the returning officer his chief clerk, Botha, Mr. Watt, the agent of the first respondent, Green, the petiOctober 31. Nov. 1, 2, 28. The Newcastle Election Petition. tioners, Johnstone and Parks, in person, and the second clerk, Jackson. The chief clerk and the second clerk, who took part in the counting, did not take the oath of secrecy, before the counting of the votes, in violation of the 36th clause of the First Schedule attached to the law; the other persons may have taken such oath, but the evidence does not show that they did.

At the commencement of the counting the returning officer did not inspect the backs of the ballot papers; when he had counted the votes on about 20 papers, the agent of the first respondent, Green, called his attention to written numbers on the backs of some of the ballot papers. Thereupon, the returning officer started anew, placing those papers, whereon numbers were written on the back, on his left hand, and the counted papers in front of him. When all the papers had been so dealt with, the returning officer was in doubt whether he should reject those which had numbers written in pencil on the back. The petitioner, Johnstone, appealed to him, contending that the votes, therein contained, ought to be counted, on the ground that it was the polling officer at Dundee who had placed the electoral numbers of the voters on the back, Mr. Johnstone himself having seen that officer at Dundee so Mr. Green's agent, who had at first objected, then agreed that these votes should be counted, and the petitioner Parks also was willing. The returning officer, being in doubt, announced his intention of suspending his decision until he could communicate with the Government on the matter. Mr. Johnstone objected, saying "You ought to use your own discretion." Nevertheless, the returning officer drew up and read aloud a telegram containing these words :-

- "From Magistrate, Newcastle, to Colonial Secretary, Maritzburg.
- "Are ballot papers having voters' register number marked on back by presiding officer invalid? Cannot declare result of the election until this question decided. Very urgent. There are 176 papers so marked."

Having despatched this telegram, the returning officer at 1·15 p.m. went to lunch, leaving the ballot papers loose on the table in the large Court room. The outer door of that room was locked, and a door leading therefrom to the clerk's room was also locked, but the door leading from the Magistrate's private room into the Court room was not locked, and access could be had from the clerks room, through the Magistrate's private room, to the large Court room. By thus leaving the papers loose on the table of the Court room,

the returning officer contravened the 18th clause of the First Schedule attached to the Ballot Law, whereby it is provided that "during the excluded time (in counting) the returning officer shall place the ballot papers and other documents relating to the election under his own seal, and the seals of such of the agents of the candidates as desire to affix their seals, and shall otherwise take proper precautions for the security of such papers and documents."

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At 20 minutes to 3 o'clock a reply arrived from the Colonial Secretary in these words:

"Your telegram received. The Attorney-General advises that under Section 2 of the Ballot Law, any ballot papers having written on the back thereof the voter's registered number, by which the voter can be identified, is void, and cannot be counted. This has been decided in the case of Woodward v. Sarsons. The duty, however, of deciding whether to reject such votes rests with you as the returning officer."

Upon the receipt of this reply, the returning officer rejected the papers with the written numbers on the back. The number of the rejected papers was counted there and then, but the votes therein contained were not counted. The returning officer said that he would write "rejected" on those papers, with the reason for their rejection, and, when Mr. Johnstone repeated his protest, said that he would note such protest on all the papers. Such endorsement, however, was not made at that time. At 3 o'clock the result of the poll was publicly announced, at the door of the Court House, to be thus:—

Green	•••	•••	168	votes.
Van Rooyen		•••	157	,,
Johnstone	•••		151	"
Parks			145	•

Then the candidates, Johnstone and Parks, and Mr. Watt, the first respondent's agent, left, and the returning officer, calling in the messenger, Harris, who was not sworn to secrecy, proceeded to "endorse" the rejected papers. In every instance, the "endorsement" was on the face of the ballot papers, sometimes longitudinally and sometimes vertically on the paper. The returning officer himself wrote two in ink and 28 in black pencil; the 2nd clerk one in ink, 88 in black pencil, 4 in blue pencil, and one in red pencil; the messenger 49 in black pencil; there was one endorsement in another person's writing, but I know not who that person was. The returning officer signed each such endorsement in pencil, except in three instances wherein the sig-

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nature was in ink. The wording of such endorsements was not uniform; there were, at least, three varieties of diction. At the same time, the returning officer, presumably to satisfy his own curiosity, counted the votes which were contained in the ballot papers which he had so rejected.

The petitioner, Johnstone, returned about 4 p.m. with the written protest of himself and his colleague, Parks, against the rejection of such papers. That protest ran in these

words:

"Newcastle, Sept. 28th, 1892.

"We, the undersigned, herewith beg to protest against the rejection of the 178 votes, polled at Dundee, in this division, on the 27th inst., upon the ground that the numbers on back of the ballot papers were placed there by the presiding officer, and not by the voters, whereby a great injustice has been done to the electors of Dundee.

"F. A. R. JOHNSTONE.
"JOHN PARKS."

When this was handed to the chief clerk, or to the returning officer, the chief clerk, first asking the returning officer's permission, informed him that, if the rejected votes had been counted, he, Johnstone, would have been second at the poll, Green first, Van Rooyen third, and Parks fourth; he, at the same time, wrote the numbers of votes rejected, as against each of the candidates, on a piece of paper which he handed to Mr. Johnstone. The counting paper, used by the chief clerk at the counting of the good votes, is in evidence, with the rejected numbers added thereto in pencil.

Next day the petitioner, Parks, received similar information from Mr. Watt on the racecourse, and expressed his strong displeasure that the votes on the rejected papers had

been so scrutinised and so counted in his absence.

At the trial, at the request of the respondents, I permitted the counted papers to be scrutinised. As a result of such scrutiny, four papers were submitted for my decision thereon.

Ballot paper, printed number 101, for Johnstone and Parks, was objected to by respondents for want of the official mark on its back. The petitioners' counsel admitted that this paper was bad. I held that the paper could not be connted, being specially shut out by the 2nd section of the Ballot Law and being in violation of the 7th clause of the First Schedule attached thereto. The evidence does not show how this paper came to be counted by the returning officer. It may be that it was counted by mere inadvertence, but, if otherwise, I would invite attention to the following remarks, in which I heartly concur;—"The returning

officer has no option but to reject all the ballot papers wanting the official mark, even when it is obvious and admitted Nov. 1, 2, 28. that the presiding officer has been in fault. The agreement of all the candidates or their agents to waive objection and to Election Petiaccept the result of the vote as ascertained by the returning tion. officer without reference to the want of the official mark will not warrant him in departing from the express provision of the statute. Such agreement could bind no one who was not a party to it, and all the electors in each ward are interested in the election." In the Wigtown case (2 O'Malley and Hardcastle, p. 215) Lord Ormidale held that two ballot papers were bad for want of the official mark, and said, "I have no alternative but to hold that they ought not to have been counted, and that they must now be rejected. I apprehend that there must have been an omission in the hurry of the proceedings to apply the official mark. No doubt this is a hardship upon the voter in one sense, but the voter has a particular duty to perform in reference to it, that is to say, he must fold up the ballot paper so as to show the official mark on the back. Therefore his attention is directed to that matter, and it is his own fault if he does not see that the mark is upon his voting paper." The votes on this paper, counted by the returning officer, must be struck off.

Ballot paper, printed number 1303, vote for Van Rooyen only, was objected to by the petitioners, because the electoral number of the voter was written on its back. The second respondent, Van Rooyen, admitted that it was void. hold that this paper is void under the 2nd section of the Ballot Law. This vote, counted by the returning officer,

must, therefore, be struck off.

Ballot paper, printed number 1309, votes for Johnstone and Parks, was objected to by respondents, because the electoral number of the voter was written on its back; the petitioners' counsel admitted that the paper was void. now hold that the paper is void under the 2nd section of the Ballot Law, and that the votes, counted by the returning officer, must be struck off.

Ballot paper, printed number 62, votes for Green and Van Rooyen, was objected to by petitioners on the ground that, on its face and in the square opposite the name of Johnstone, there is a smudge, which they contended was the remains of a cross; they urged that this paper should be rejected (1) because the smudge constituted a mark whereby the voter could be identified; (2) because the voting on such smudged paper was in violation of the 11th clause of the First Schedule by which special provision is made with reference to spoilt ballot papers, which are to be cancelled for other ballot papers. The first respondent, Green,

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admitted that the smudge was the remains of a cross, but the second respondent, Van Rooyen, urged that there had not been a cross there. I carefully inspected this smudge: there may have been a cross there, indeed, I am now inclined, having examined it by the aid of a microscope, to think that the smudge is the remains of a cross. I held that the paper was good and that the votes had been rightly counted. It is difficult to hold that such a mark, which, from the appearance of the paper, I think was made by inadvertence, constitutes a mark whereby the voter could be identified. And I do not think that the voter acted in contravention of the 11th clause of the First Schedule of the Ballot Act, which provides that a voter, who has inadvertently dealt with his ballot paper in such a manner that it cannot be conveniently used as a ballot paper, may obtain another ballot paper. I do not consider that this slight smudge prevented the voter from conveniently using this paper as a ballot paper.

With reference, therefore, to the ballot papers, with printed numbers 101, 1303, and 1309, which the returning officer counted, and which I now reject, it follows that the return, which the returning officer ought to have made was:

Green				168	votes
Van Rooyen	٠	157-1	=	156	"
Johnstone		151-2	=	149	11
Parks		145-2	=	143	,,

And now as to the 178 papers which the returning officer rejected.

Ballot paper, printed number 847, a vote for Van Rooyen only, was rejected because it had on its face, in the square opposite Van Rooyen's name, the initials J.P. written in pencil: the returning officer considered that this writing afforded the means of identifying the voter. I am now of opinion, and so I held at the trial, that the returning officer was right in rejecting this paper. I notice, moreover, that this paper is bad, because it bears no cross opposite the name of any candidate.

This paper having been so dealt with, there remain 177 papers which the returning officer rejected, because on the back of each the voter's electoral number was written. Three of those 177 papers were specially submitted for my decision on other grounds.

I held that the ballot paper, printed number 692, purporting to contain votes for Green and Van Rooyen, was void, because the crosses were on the back and not on the face of the paper.

For a like reason I rejected ballot paper, printed number 760, purporting to contain votes for Parks and Van Rooyen.

I rejected ballot paper, printed number 1378, purporting to contain votes for Parks and Van Rooyen, because, Nov. 1, 2, 28. although there was a cross opposite the name of Parks, there was only a perpendicular mark opposite the name of Van Election Peti-Rooyen. Apart from the electoral number written on the tion. back of the paper, it was contended, for petitioners, that this was a good vote for Parks and a bad one for Van Rooyen. This amounted to a contention that the paper could be good in part and bad in part. The second respondent, Van Rooyen, urged that, if the paper was not bad because the electoral number was on the back, it contained a good vote for himself, because the perpendicular mark opposite his name sufficiently indicated that the voter intended to vote for him. I held that, apart from the question of the electoral number on the back, this perpendicular mark opposite Van Rooyen's name vitiated and rendered void the whole paper. The voter knew that he ought to make a cross, because he made one opposite the name of Parks; his action, therefore, in placing a perpendicular mark opposite the name of Van Rooyen must be taken to be not accidental but as indicating premeditation or collusion. is sufficient, without searching for further motives, to hold that this perpendicular mark constitutes matter whereby the voter can be identified and that, therefore, the whole paper is bad.

Although, therefore, these 177 ballot papers were each marked by the presiding officers with the electoral number on the back, three of those papers are bad and cannot be counted because the voters themselves have acted contrary to

the provisions of the Ballot Law. They have only themselves

to blame for being disfranchised.

It now remains that I should deal with the 174 rejected papers, against which it may be urged that they are bad solely by reason of something being written on the back, whereby the voter in each paper can be identified. It was admitted at the trial that the numbers, written by the presiding officers on the backs of these papers, were the numbers appearing opposite the names of the electors on the voters' The returning officer, and those who were present at the counting of the votes, knew that these written numbers were the electoral numbers of the voters, and the "endorsements" were to that effect. Certain paragraphs of the petition convey the idea that it was at one time in the mind of the petitioners to contend, at the trial, that such papers ought not to have been rejected by the returning officer because the objectionable matter on the back had been written by the presiding officers and not by the voters. verbal protest made during the counting and the written

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protest handed, after the poll was declared, to the returning officer by the petitioners, Johnstone and Parks, convey the same idea. At the trial, however, there was no such contention. The learned counsel for the petitioners admitted, in the clearest terms, that the 174 papers, with the electoral numbers on the backs, which the returning officer rejected, were void and not to be counted, because they contravened the 2nd section of the Ballot Law. And, of course, the respondents said the same: their defence was that those papers had been rightly rejected. It is not, therefore, necessary that I should here dwell in detail upon this question of identification of a voter by means of matter written on the back of his ballot paper; it is sufficient that I should refer, on this point, to my judgment in the Weenen Election case and to the English and Scotch cases cited therein. I find, formally, that these 174 ballot papers were rightly rejected by the returning officer under the 2nd section of our Ballot Law.

Before I leave this point, it is well that I should refer to "consents" to waive objections. When the returning officer was in doubt about the rejection of these 174 papers, Mr. Johnstone says "I proposed that he should count all such papers, so marked, together with the other ballot papers, to which Mr. Watt, the representative of Mr. Green, and Mr. Parks agreed; but the returning officer did not approve of such proposed counting, and he said that he would wire for instructions how to act." I am of opinion that the returning officer was right in declining to act on such consent of the candidates and of a candidate's agent. I entirely agree with the following remarks of a learned writer on this point; I quote them at length, as they will thus be readily accessible to returning officers if hereafter similar complications may arise: "When the contravention is obviously and admittedly occasioned by the fault of the presiding officer or polling clerks, it is hard to reject the votes of innocent electors, and, it may be, necessitate a new election. theless, the returning officer wiil not be warranted in sustaining such votes. The consent of the candidates or their agents to waive objection, and to accept the result of the vote as ascertained by the returning officer, without looking at the elector's number, or otherwise seeking to violate the secrecy which the Ballot Act enjoins, cannot justify the returning officer in departing from the express provisions of the statute. The community as well as the candidates are interested in the election."

I have now to consider, (1) whether the irregularities, clearly proved to have occurred at this election, justify me in holding that the election was not conducted in accordance

with the principles laid down in the body of our Ballot Law, and (2) whether by reason of such irregularities the result Nov. 1, 2, 28. of the election has been affected.

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- (1) I will briefly tabulate these irregularities:—
- (a) The presiding officers at Dundee and Helpmakaar, by writing the electoral numbers of the voters on the back of the ballot papers, have disfranchised 176 voters.
- (b) The returning officer did not forward to the presiding officer at Dundee the book of "Instructions to presiding officers" in due time, so that such officer could have reasonable opportunity to study the same. Those instructions, with all the ballot stationery, were not received by the presiding officer until 20 minutes to 8, the hour at which the polling commenced. This was not in accordance with the 7th section of the Ballot Law, which provides that the returning officer shall do such acts and things "as may be necessary for effectually conducting an election in manner provided by this law."
- (c) On the day of counting the votes, he had at least two assistants who did not, for the purpose of such counting, take the oath of secrecy which the Ballot Law requires.
- (d) He did not himself, and without the advice of any other person, decide that the marked ballot papers were void. He, notwithstanding the protest of the petitioner Johnstone, consulted the Government and acted upon the reply which he received by telegram, contrary to the spirit and special enactments of the Ballot Law.
- (e) For the purpose of taking such advice, he interrupted the counting from 1.15 p.m to 2.40 p.m., contrary to the 18th clause of the First Schedule.
- (f) During such interval he did not place the ballot papers and other documents under his own seal and those of the agents, as the said 18th clause of the First Schedule requires, nor did he "otherwise take proper precautions for the security of such papers and documents," inasmuch as they were left lying loose on the table in the large Court Room to which there was access from the clerk's room by means of the Magistrate's private room.

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- (g) He did not, when rejecting the 174 marked ballot papers, then and there endorse such rejected papers, as the 19th clause of the First Schedule commands, but kept such papers for endorsement after the poll was declared.
- (h) He did not himself, as the 19th clause of the First Schedule requires, endorse such rejected papers, but permitted two other persons, who had not taken the oath of secrecy, to write the whole of the endorsement on many of the papers, himself merely signing them.
- (i) Such "endorsements" were not on the back of the papers, but on the face. Three were written in ink, 166 in black pencil, four in blue pencil, and one in red pencil. Such so-called "endorsements" varied in diction, and some were written vertically, and some longitudinally, on the papers. And, lastly, instead of being neatly written, some were most carelessly written, those in blue pencil sprawling over, and disfiguring, almost the whole of the face of the ballot papers.
- (j) After the declaration of the poll, he went seriatim through the rejected papers, counting how many votes were therein contained for each candidate. He then added the totals to the numbers which he had already publicly declared as the result of the poll, and thus discovered exactly how each candidate would have stood if such votes had not been rejected. This information he imparted to his chief clerk, who, with the returning officer's permission, and in his presence, shortly afterwards communicated it to the petitioner Johnstone. Next day such information was part of the babble and chatter on the Newcastle race-course. This was most seriously in contravention of the main principle, that of secrecy, of the Ballot Law.
- (k) Although he rejected 177 papers, because they had the electoral numbers written on the back, he yet counted two papers which bore the same disqualification. He also counted one paper which was bad for want of the official mark.

The marking of the 176 ballot papers with the electoral numbers of the voters is a fatal departure from the main principle of the Ballot Law, namely, that of secrecy. There were at least two other contraventions of the same great principle. Then, there is error upon error, which, although

each by itself would be insufficient to render the election void, nevertheless have a cumulative effect to which I cannot refuse judicial notice. I find, formally, that this election was not conducted in accordance with the principles laid down in the body of our Ballot Law, No. 29 of 1887.

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2. By reason of the above non-compliance with the principles of the Ballot Law, has the result of the election been affected? If the votes contained in the 176 rejected papers (174 rejected by the returning officer, and 2 by the Court) be counted, they appear thus:

Green	•••	•••	74	votes.
Van Rooyen	•••	•••	81	,,
Johnstone	•••	•••	95	,,
Parks	•••		94	••

If these numbers be added to the numbers of the published return, as amended at the trial by my decisions concerning the *counted* ballot papers 101, 1303, 1309, we have the following results:—

Johnstone	149 + 95 = 244	l votes
Green	168 + 74 = 242	2 ,,
Van Rooyen	156 + 81 = 237	7 ,,
Parks	143 + 94 = 237	7,,

Thus, Johnstone is moved up from the third to the first place, Green is moved down from the first to the second, and Van Rooyen descends from second place to an equality with Parks, who was at the bottom of the poll as declared by the returning officer.

I find that non-compliance with essential principles of the Ballot Law did affect the result of the election.

I find, therefore, formally, that the election for the electoral division of Newcastle, County of Klip River, held on September 27th, 1892, and all the proceedings connected therewith, are null and void, and that the seats of the respondents are vacant,

As to costs, I follow the principle upon which I acted in the Weenen election case and I order that each party do bear his own costs.

Before I proceed to the petitioners' special case against the first respondent, it becomes my duty, I think to take judicial notice of the returning officer's absence from the trial. The learned counsel for petitioners informed me, at the trial, that the returning officer was out of the Colony on leave of absence, which commenced shortly (18 days) before the trial, that the petitioners had not objected to such leave of absence, nor formally served subpœna upon 1692. October 31. Nov. 1, 2, 28. The Newcastle Election Petition.

him, because he had undertaken, on certain conditions, to return and be present at the trial, and that, although petitioners were prepared to fulfil such conditions, he had refused to return. The correspondence and telegrams are filed of record. As subpæna had not been served upon him, and as he was not within the Colony, I could not exercise the ample powers conferred upon the Court by the 16th section of the Election Petitions Law, No. 16 of I was constrained, however, to think that, in his own interests, the returning officer should have made the utmost endeavour to be present, in order that he might explain, if possible, the very serious irregularities which the evidence has disclosed. Further, it appeared to my mind to be scarcely fair that he should leave his chief clerk to face the criticism which was bound to follow such disclosures. It is right that I should here record that the chief clerk does not appear to be responsible for any of the irregularities which I have tabulated above, except, to to some extent, for one—(i).

As I have declared, on the main issues of the petition against both respondents, that the election is null and void, it is really not necessary that I should decide the alternative case against the first respondent, Green. As, however, his competency, to become a candidate or to be a member of the Legislative Council of Natal, was publicly challenged before the election, as this question received considerable attention at the trial, and, lastly, as my opinion, now given, may, perhaps, save much trouble and expense in the future, I proceed to the consideration of this important averment that he, the first respondent, is an alien and cannot be elected to, nor be allowed to continue to sit in, the Legislative Council of this Colony. It is, of course, to be clearly borne in mind that I am dealing with Mr. Green's status, as gathered and to be defined from the proved special circumstances in which he has lived and still is living, and that my decision is no way intended to apply to a whole class of inhabitants of South Africa. Doubtless, my opinion may be taken to reach beyond Mr. Green and to be applicable to numerous persons, entirely unconnected with this petition, but with that I have nothing to do: my opinion is based on the special points appearing in Mr. Green's case only.

At a public meeting, held at Newcastle on September 14th, at which three of the four candidates were present and spoke, Mr. Green was asked "whether he could hold a seat in the Legislature, in view of the fact that he was a

burgher of, and owed allegiance to, the Free State." Mr. Green replied that "he was a British subject wherever he Nov. 1, 2, 28. went-it was a legal question which they could try in a Court of Law if they chose." On September 22nd, the petitioners, Johnstone and Parks, with 10 other persons, tion. lodged with the returning officer at Newcastle a written protest against Mr. Green's candidature at the forthcoming election on the ground that "it is not competent for him to be a candidate or member of the Legislative Council because he is a citizen or burgher of the Orange Free State." That protest was published in the Newcastle Herald of September 24th, the Natal Advertiser of September 24th, the Natal Mercury of September 26th, and the Natal Witness of September 26th. The election was held on September 27th. The petitioners have accepted the proposition, laid down by Mr. Green at the Newcastle meeting, that it was a legal question which they could try in a Court of Law if they chose, and in this, their alternative case against Mr. Green, they specially aver, "that the said Richard Allan Green was prior to, and at the date of, the said election, and still is, a subject, citizen, or burgher of the Orange Free State and was then, and still is, enrolled on the Burgher Roll of the Ward Vrede, in the district of Harrismith, in the said State, and, prior to and since the said election, has concurred in or adopted an act whereby he became, and still is, a subject, citizen or burgher of the said Orange Free State." Upon proof of this special averment, the petitioners ask that the seat of Richard Allan Green may be declared vacant, that the first or second petitioner be declared to have been elected thereto, or that a fresh election be ordered in respect of the said vacant seat.

There can be no room for doubt that I have jurisdiction to inquire into and determine this special alternative prayer of the petitioners. The 2nd section of our Election Petitions Law, No. 16 of 1883, enacts: "All questions of disqualification or undue election, or undue return, alleged against any member of the Legislative Council-whether such questions relate to the want of qualification as required by the 13th clause of the said Charter, or to other matters of disqualification or undue return-shall be inquired into and determined in manner and form as hereinafter pro-By the 3rd section it is provided that a petition complaining of want of qualification, or of undue election or undue return, of any member of the Legislative Council of Natal, may be presented to the Council, and, by subsequent sections such petition is in due course to be tried by the Election Petitions Judge for the year.

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I will here give all the facts, proved or admitted at the trial, concerning the parentage and life history of Mr. Green, which are material to, or connected with, the questions which I have to decide.

Mr. Green is more than 60 years of age. He was born of English parents, in the English county of Gloucester-He lived in England until he was 14 years old, and then he came to South Africa. He lived in the Cape Colony until the end of 1866. In 1867, as agent for other persons, he began to occupy the farm, Allandale, situated within the Orange Free State, and running up to the boundary of Natal. The beacons, now on that land, are those put up by the Boundary Commission some years ago as the boundaries between Natal and the Orange Free State. He built a house thereon in 1868. About 1870 he acquired that land and others, also in the Orange Free He has lived thereon continuously, State, by purchase. from 1868 to the present time, except when he has visited England and when he resided at Pietermaritzburg, in this Colony, during the sessions of the Legislative Council, in the periods detailed below. His landed property in the Orange Free State is worth at least £10,000. On June 20th, 1871, he was approinted a Justice of the Peace of the Orange Free State for the district of Harrismith, and was re-appointed on January 8th, 1879, when he took the following oath under Art. 1 and 15 of Ordinance No. 2, 1870, of the Free State Law:—

"I, Richard Allan Green, hereby declare and swear to be faithful to the Government of the Orange Free State, and that I, as Justice of the Peace, shall do equal right to the rich and to the poor, to the best of my competency and ability, and in accordance with the Laws and Customs of the Orange Free State, and the ordinances and proclamations thereof, and that I shall give no advice in any matter of dispute pending before me, nor impede the course of justice for any gifts or other reasons, but I shall well and truly perform my duty as Justice of the Peace, without partiality favour, or affection.

"So truly help me, God Almighty."

As Justice of the Peace he received no pay, but, as defined by Chapter IV. of the Orange Free State Laws (cf. appendix A) he was a subordinate Magistrate within the limits of his district, entitled and bound to carry out the powers specified and granted to Magistrates respecting arrest in the law dealing with criminal procedure, and, interalia, he was protected as to actions at law by certain pro-

visions of the Law-The appointment of 1879 expired on On November 3rd, 1876, as a duly Nov. 1, 2, 28. January 7th, 1882. qualified voter, he,by his agent, S. Odendaal, voted for C. J. de Villiers, Jr., as member of the Volksraad for the Election Petiward of Klip Rivier, in the district of Harrismith, in the tion. Orange Free State. In 1881 he accepted a requisition to become a candidate for election as a member of the Natal Legislative Council: he was elected, and, when the Council met (second session) on October 6, 1881, he took his seat, having first subscribed the oath of allegiance, required by the 20th Clause of the Charter, in the prescribed words:

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do sincerely promise and swear that I will be faithful, and bear true allegiance to Her Majesty .--So help me God."

That Council (the ninth) was dissolved on March 10th, In the next Council (the tenth, which met in June, 1882, and was dissolved in April, 1883), he was not a member. He was elected to the 11th Council, taking his seat at the second session which began in June and continued until September, 1884, again subscribing the oath of allegiance to Her Majesty. He attended its third and last session, from June 18th, 1885, to September, 1885. From the date of the dissolution of that Council (June 7th, 1886), to the time of the election, with which I am now dealing, he has not been a member of the Natal Legislative Council. On September 20th, 1882, he obtained from the Natal Government grazing leases for a term of 10 years, at an annual rental of £17 19s. 11d. and £5 10s. 11d., of two pieces of land, immediately adjoining, on the Natal side, his property in the Orange Free State; he did not reside thereon but bought them for farming purposes and as a location for his kafir servants. At any time, within that term of 10 years, those leases could be determined by either party upon 12 months' notice. Those leases expired on September 20th, 1892, and he now holds those lands. on payment of rent in advance, from month to month. In May, 1892, he bought, for £63, an erf of land in Newcastle, to qualify himself as an elector in Natal. not built upon it, nor resided thereon.

We see, then, that Mr. Green starts as a natural-born British subject. After his arrival in South Africa, to the year 1870, he enjoyed the advantages, and was subject to the liabilities, attaching to the position of a subject of Her Most Gracious Majesty the Queen. To use Mr. Green's own words, "wherever he went, he was a British subject."

The allegiance of a natural-born British subject was regarded by the common law as ineffaceable.

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might change his domicile as often as he wished; his allegiance remained fixed. This old doctrine, nemo potest exuere patriam, is well stated in the exalted words of Blackstone (bk. iv., part I., chap. ii.): "Natural allegiance is such as is due from natural-born subjects. This is a tie which cannot be severed or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the Legislature. An Englishman who removes to France or to China owes the same allegiance to the King of England there as at home, and twenty years hence as well as now. The natural-born subject of one Prince cannot, by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that Prince to whom it was first due. Indeed, the natural-born subject of one Prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural Prince. In certain cases he may forfeit his rights as a British subject by adhering to a foreign power, but he remains always liable to his duties; and if, in the course of such employment, he violates the laws of his native country, he will be exposed to punishment when he comes within reach of her tribunals. Natural allegiance is perpetual."

But in 1870 this old common law doctrine was aban-The inconvenience arising from the incapacity of British subjects to renounce allegiance to Her Majesty, although at perfect liberty to emigrate whithersoever they pleased, became so great that on May 21st, 1868, a Royal Commission was issued (1) "to enquire into and consider the legal condition of our natural-born subjects who may depart from and reside beyond the realm in Foreign Countries, and to report how, and in what manner, having regard to the Law and Practice of other States, it may be expedient to alter and amend the laws relating to such natural-born subjects, their wives, children, descendants, or relations; (2) and, also, to enquire into and consider the legal condition of persons, being aliens, entering into or residing within the realm, and becoming naturalised as subjects of the Crown, and to report how far, and in what manner, it may be expedient, having regard to the Laws and Practice of this country, of Foreign States, or otherwise, to alter or amend the laws relating to such persons, or persons claiming rights or privileges through or under Nov. 1, 2, 28. them."

The very distinguished men who were members of that Election Peti-Commission made their report on February 20th, 1869. tion. On that report was based the Imperial "Naturalisation Act, 1870 " (33 and 34 Vic., cap. 14). To show that the legislation which the Commissioners recommended was more of the enabling than the disabling class, I quote the following from their report :—

- "There are two classes of persons who by our law are deemed to be natural-born British subjects:—
- 1. Those who are such from the fact of their having been born within the dominion of the British Crown:
- 2. Those who, though born out of the dominion of the British Crown, are by various general Acts of Parliament declared to be natural-born British Subjects.
- The allegiance of a natural-born British subject is regarded by the Common Law as indelible.
- We are of opinion that this doctrine of the Common Law is neither reasonable nor convenient. It is at variance with those principles on which the rights and duties of a subject should be deemed to rest; it conflicts with that freedom of action which is now recognised as most conducive to the public good, as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a State which allows to its subjects absolute freedom of It is inexpedient that British Law should maintain in theory, or should by foreign nations be supposed to maintain in practice, any obligations which it cannot enforce, and ought not to enforce if it could; and it is unfit that a country should remain subject to claims for protection of the part of persons who, so far as in them lies, have severed their connection with it.
- We accordingly submit to your Majesty the following recommendations tor an amendment of the law in this respect:
- 1. Any British subject, who, being resident in a foreign country, shall be naturalised therein, and shall undertake, according to its laws, the duty of alleg-

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iance to the foreign State as a subject or citizen thereof, should, upon such naturalisation, cease to be a British subject."

As I have said, on that report was based the Imperial "Naturalisation Act, 1870" (12th May, 1870). It is "An Act to amend the Law relating to the legal condition of aliens and British subjects." It is with those portions of it, which are ranged under the heads of "Expatriation" and "Naturalisation and Resumption of British Nationality," that I have chiefly to deal in the present case—(cf. Appendix B.).

It is the 6th section, which, as the Commissioners wished, swept away the old-fashioned and inconvenient doctrine that a British subject could never divest himself of his nationality. Its words are so important that I quote

them:

"Any British subject who has at any time before, or may at any time after, the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalised in such State, shall, from and after the time of his so having become naturalised in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien."

The section goes on to provide that any British subject who, before the passing of the Act, has voluntarily become naturalised in a foreign State, may, within two years after the passing of the Act, make a delaration that he is desirous of remaining a British subject, and upon his taking the oath of allegiance, he shall be deemed to be and to have been continually a British subject: with the qualification, that he shall not, when within the limits of the Foreign State in which he has been naturalised, be deemed to be a British subject, unless he has ceased to be a subject of that State in pursuance of the laws thereof or in pursuance of a treaty to that effect.

The next important section is the 8th, whereof the words are as follows:—

"A natural-born British subject who has become an alien in pursuance of this Act, and is in this Act referred to as a statutory alien, may, on performing the same conditions and adducing the same evidence as is required in the case of an alien applying for a certificate of nationality, apply to one of Her Majesty's Principal Secretaries of State for a certificate hereinafter referred to as a certificate Nov. 1, 2, 28. of re-admission to British nationality, re-admitting him to the status of a British subject.

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The conditions above referred to are to be found in the 7th section, and are (1) residence in the United Kingdom for a term of not less than 5 years (or service under the Crown for not less than 5 years), and (2) an intention, when re-admitted, either to reside in the United Kingdom or to serve under the

I now proceed to deal with Mr. Green's position with reference to these two sections, the 6th and 8th, of this Imperial Act.

Section 6. There are three questions which I have to decide hereunder :---

- A. was Mr. Green, before the passing of this Act, a British subject?
- B. Was the Orange Free State, when this Act was passed, and is it now, a foreign State within the meaning of this section?
- C. Had he, before the passing of this Act, or did he, after its passing, voluntarily become naturalised in the Orange Free State within the meaning of this section?
- (A) As I have already said, before this Act was passed, Mr. Green was a natural-born British subject and to him applied the old common law doctrine that he could not, no matter where he roamed, divest himself of his British nationality.
- (B) In 1870 was the Orange Free State, and is it now, a foreign State? In the first place, the Act itself, in the 17th section, defines what is "a British possession." "A British possession" shall mean a colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, and all territories and places under one legislature are deemed to be one British possession for the purposes of this Act." Secondly, however complicated might have been the political position of the territory now known as the Orange Free State, with reference to Great Britain, before 1854, it is certain that complete independence was accorded to it by the latter in 1854. I fear that the majority of our Dutch friends and neighbours in that State will be astonished, if not startled,

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to know that a Natal Court is, 38 years after its complete autonomy, solemnly discussing the point whether, with regard to Great Britain, their State is a foreign State. But Mr. Green, the first respondent, a resident in that State, has stoutly argued that it is not a foreign State in the sense that Russia or Prussia is, and it is well, therefore, that I should briefly deal with his contention and set the matter It is not necessary to refer to the earliest history of the Orange River territory. On March 22nd, 1851, letters patent were issued, under the Great Seal of the United Kingdom, erecting the Orange River Territory into a separate and distinct government and empowering the Governor of the Cape of Good Hope, or the Lieut.-Governor of the said Orange River territory, with the advice and consent of a Legislative Council, to make laws for the government of the said territory. On the same date Royal Instructions were issued, which regulated the power of the On referring to Governor under the Letters Patent. Parliamentary Papers (Orange River Territory) presented to both Houses of Parliament, May 31st, 1853, I find curious disclosures as to the "suppression" of those Letters Patent: that is the expression used in Governor Cathcart's despatch of January 13th, 1853, to the Secretary of State. That despatch and its instructive enclosure from the Cape Attorney-General are in appendix "C," attached to this judgment. They show how it was that the territory was sometimes termed the Orange River Territory, and sometimes the Orange River Sovereignty, and they also disclose that Her Majesty's Government had constantly in mind the question of "abandoning the obligation assumed by Her Majesty's Government in repect to the Sovereignty;" indeed, Earl Grey, in a despatch of October 21st, 1851, only 7 months after the issue of the Letters Patent, had instructed Governor Sir Harry Smith that "the ultimate abandonment of the Orange River Sovereignty should be a settled point in our policy." In April, 1853, her Majesty appointed Sir G. R. Clerk, K.C.B., late Governor of Bombay, as Special Commissioner "for the delicate and difficult duty of carrying into effect the relinquishment, on the part of the Crown, of the Orange River Sovereignty" (cf. the Duke of Newcastle's despatch of April 14th, 1853, to Governor Cathcart). Sir George Clerk arrived at Bloemfontein on August 8th, 1853, and on the same day issued orders, through the British resident at Bloemfontein, to the district Magistrates and field cornets, to convene a meeting of delegates on the part of the European population, "in order to consider and determine the form of that self-government which must henceforth devolve upon them."

On the day after his arrival he replied to a deputation of the inhabitants of Bloemfontein, in terms which, he says, left no doubt of the intentions of her Majesty's Government.

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"I am obliged to you for this address. As far as regards my feelings towards yourselves, and my observation of your enterprise, it would be most agreeable to me to be enabled to reply to you in the terms you must naturally desire. But the Imperial Government has to consider the interests of all, and has thus been led to determine to relinquish dominion over this Notwithstanding the present disappointment which this may cause you, I trust that eventually many of you will find that your investments and profits, whether in land or in trade, are not likely to suffer from the change. But in every case in which a British subject may consider that it is no longer consistent with his interests to remain here, her Majesty's Government will be prepared to give due consideration to claims grounded on the abandonment of property acquired under encouragement held out by former authorities."

Sir George Clerk considered that a large majority of the Dutch settlers in the Bloemfontein district, who were to the British as eight to one, would rejoice in the prospect of being allowed to govern themselves: he estimated the entire Dutch population throughout the territory to outnumber the English in proportion of twenty to one. It is needless to describe, in detail, the agitation which ensued in the last part of 1853 and in the beginning of 1854: in the territory itself there were meetings of the inhabitants and delegates, and from outside the territory petitions were forwarded to Her Majesty, against the abandonment of the Orange River Sovereignty, from Capetown, Burghersdorp, Swellendam, Grahamstown, Uitenhage and Port Elizabeth.

At length, on the 23rd February, 1854, at Bloemfontein, Sir George Clerk and the representatives delegated by the inhabitants of the territory signed the Articles of Convention, which I subjoin in appendix "D." Thereby the most complete independence was secured for the Orange River territory. "The inhabitants of the territory shall be free. This independence shall, without unnecessary delay, be confirmed and ratified by an instrument, promulgated in such form and substance as Her Majesty may approve, finally freeing them from their allegiance to the British Orown, and declaring them, to all intents and purposes, a free and independent people, and their Government to be treated and considered thenceforth as a free and independent Government."

1892. October 31. Nov. 1, 2, 28. The Newcastle Election Petition. Her Majesty's Order in Council, and Proclamation (cf. Appendix E) wherein Her Majesty "did declare and make known the abandonment and renunciation of our dominion and sovereignty over the said territory and inhabitants thereof," were duly promulgated in April, 1854. The Order in Council concludes thus: Upon and from and after such promulgation all dominion and sovereignty of her Majesty over the said territory and the inhabitants thereof shall absolutely ceuse and determine, and her officers and ministers, military and civil, shall with all convenient speed be withdrawn from the said territory."

A new name was at once adopted by the Republic; it

became the "Orange Free State."

Thus, the Orange Free State was, in 1870, when the "Imperial Naturalisation Act" was passed, a State in all respects free from her Majesty's authority and dominion. It is so at the present moment. I therefore hold that such State was, in 1870, and is now, a foreign State within the meaning of the 6th section of the said "Imperial Naturalisation Act of 1870."

(C) Had Mr. Green, before the passing of the Imperial Act of 1870, or did he, after its passing, voluntarily become naturalised in the Orange Free State, within the meaning of this 6th section?

In the first place, what is the meaning of the terms "naturalise" and "naturalisation"? In N. Bailey's dictionary (9th Edition) published so long ago as 1740, I find the following definitions: "Naturalisation is when one who is an alien is made a natural subject by an Act of Parliament or Consent of the Estates." Again, "to naturalise, to admit into the number of natural subjects." Grotius (bk. 1, ch. 13, s. 6) says, "foreigners obtain the rights of a subject, or citizenship, by consent of the States."

This oth section is not quite so full as the recommendation, upon which it is based, of the eminent Royal Commissioners to whom I have previously referred. Their words were, "Any British subject, who, being resident in a foreign country, shall be naturalised therein and shall undertake, according to its laws, the duty of allegiance to the foreign State as a subject or citizen thereof, should, upon such naturalisation, cease to be a British subject." The recommendation shows, of course, that the Commissioners recognised that the naturalisation was to be only that which was permitted by the foreign State. It is an undoubtedly correct proposition that every independent sovereign State possesses the right to naturalise foreigners and to confer upon them the privileges of their acquired

domicile. "It must be the law of the State in question that shall decide who is to be treated as a citizen and who Nov. 1, 2, 28. as a foreigner. It is entirely in its option to make the conditions of naturalisation difficult or easy."

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Now, how has the Orange Free State provided for the tion. reception into its own nationality of persons coming, from beyond its limits, to reside within its territory? It has not passed any special law of naturalisation such as we have in Natal and such as we find elsewhere. But it possesses a constitution, Ch. 1, whereby persons, who, in the special laws of naturalisation of other countries, would be described as foreigners or aliens, are admitted into the full rights of burghership, that is, citizenship. The conditions upon which such citizenship is acquired, and the acts by which such acquired citizenship may be lost, are set out in sections 1 and 2 of the said Ch. 1 of the Constitution. I give them in extenso.

"CONSTITUTION OF THE ORANGE FREE STATE.

CHAPTER I.—BURGHERSHIP.

Section I.—How burghership is acquired.

- (1) Burghers of the Orange Free State are:—
- (a) White persons born of inhabitants as well before as after the 23rd February, 1854, within the territory of the State.
- (b) White persons who have acquired burgher right under the provisions of the Constitution of 1854, or the amended Constitution of 1866.
- (c) White persons who have resided a year in the State and have registered in their name immovable property to the value of at least a hundred and fifty pounds sterling.
- (d) White persons who have resided three successive years in the State, and have made a written promise of fidelity to the State and obedience to the laws; whereupon a certificate of burghership shall be delivered to them by the Landdrost of the district where they have established their residence.
- (e) Civil and judicial officials who previously to entering upon their office have made the oath of fidelity to the State and the laws thereof.

Section II.—How burghership is lost.

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The burghership of the Orange Free State is lost by

- (a) The acquiring of the burghership of a foreign country.
- (b) Without consent of the States President, by entering into a foreign military service, or the acceptance of public office which is conferred by a foreign Government.
- (c) By establishing a domicile outside the country, with the evident intention of not returning to this State.

Such intention shall be regarded as being expressed when a person establishes himself in a foreign country for a longer period than two years."

I especially call attention to clauses C and E of the 1st section. Under clause C Mr. Green, as the proprieter of land worth more than £150 (there is a sworn valuation, the accuracy of which is not impugned, that his landed property is worth at least £10,000), was qualified as a burgher so long ago as 1870, his term of residence, in place of one year, being at least 24 years. Under clause E Mr. Green was qualified as a burgher when he was reappointed a Justice of the Peace in 1879, then taking the oath of fidelity to the Government of the Orange Free State. Landdrost, Warden, has certified that Mr. Green is a burgher of the Orange Free State and as such is registered in the list of voter burghers. As a major burgher he is qualified to vote for the election of members of the Volksraad and of the States' President, and, so long ago as 1876, he actually did, by his agent, Odendaal, record his vote for a member of the Volksraad. As he has the privileges of a burgher, so he has been subject to the duties of a burgher: he himself admits that, were it not that he is over 60 years of age (cf. ch. 2, s. 2 of the Constitution in appendix "A"), he would now be liable to military service against the State's enemies. It was contented, and I see no reason to doubt the accuracy of the contention, that Mr. Green might be elected President.

In the Orange Free State the oath of fidelity is identical with the oath of allegiance and is only formally taken by officials under clause E, section 1, of chapter 1 of the Constitution: this is the oath which, in 1879, Mr. Green took as Justice of the Peace. The only other persons who take that oath of fidelity are those white persons who have resided 3 successive years in the State and who are not otherwise qualified. Forms of oaths, found in the Orange Free State Wetboek, 1854—1891, are collected in appendix "F."

When, therefore, I take into consideration the facts, that Mr. Green has resided, except in certain brief periods, Nov. 1, 2, 28. continuously since 1870 in the Orange Free State, that the Orange Free State was, and is now, emphatically, his home, that he has all the rights of a major burgher, and tion. has exercised such rights so far back as 1876, that he has been enrolled on two occasions as Justice of the Peace in that State, and that, once at least, he has taken the oath of fidelity to the Government of that State, that he has been liable to the obligations which burghership imposes, I find that, within the meaning of the 6th section of the Imperial Act of Naturalisation, 1870, since such Act was passed, Mr. Green has voluntarily become naturalised in the Orange Free State.

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It follows, from my finding on the three points which I have to decide under this section 6, that, on the whole section, I am of opinion that Mr. Green, after the passing of that Imperial Act in 1870, ceased to be a British subject.

Under this section has Mr. Green been re-admitted to British nationality? Has he complied with the conditions prescribed for re-admission, namely, (1) residence in the United Kingdom for a term of not less than 5 years (or service under the Crown for not less than 5 years); and (2) an expressed intention, when re-admitted, to reside in the United Kingdom, or to serve under the Crown? Admittedly, he has not received a certificate of re-admission to British nationality. I would point out that under the concluding portion of this 8th section, it would not have been necessary for Mr. Green to proceed to the United Kingdom to reside there; Natal being a British possession, residence therein for the required period of 5 years would have been deemed equivalent to residence in the United Kingdom, and the Governor of Natal could have exercised the jurisdiction, which the Act confers upon the Secretary of State, in respect of the grant of a certificate of re-admission to British nationality.

Now, this Imperial Act of 1870 extends to all British possessions, and a British subject, who becomes an alien under that Act, will be an alien in a British possession unless by the laws of such British possession he has been enabled to enjoy the privileges of naturalisation within the limits of such possession. The power to make such laws has been expressly conferred upon British possessions by the 16th Section of this Imperial Act. In Natal our Law of Naturalisation is No. 23 of 1874. By its provisions, "any alien of European parentage or descent," above the age of 21 years, may apply for a certificate of naturalisa1892. October 31. Nov. 1, 2, 28. The Newcastle Election Petition. tion on fulfilling two conditions: (1) he must have resided within the Colony for a period of two years, and (2) he must have taken the oath of allegiance to Her Majesty the Queen. When such certificate has been granted, the recipient becomes "entitled to all political and other rights, powers, and privileges, and is subject to all obligations, to which any British subject, born in the United Kingdom, and resident in Natal, is entitled or subject in Natal." Mr. Green has not been naturalised under our local law.

It is desirable that I should here refer to the fact that on two occasions Mr. Green has served as a member of our Legislative Council. In 1881 he was elected, as a member for Newcastle, and took his seat, at its second session, on October 6th of that year: that session was prorogued on December 14th following. The third and last session commenced on February 23rd, 1882: it terminated on March 2nd following. Assuming that Mr. Green did not return to his home in the Orange Free State during the interval between the 2nd and 3rd sessions, he thus resided within the Colony for a period of five months only. He was not a member of the next, the 10th, Council. Now, upon careful study of this matter, I find a most startling Under Clause 13 of our Charter of 15th July, 1856, no person is capable of being elected member of the Legislative Council unless he be a duly qualified and registered elector of some electoral district in the Colony. qualification of electors is given in the 11th clause: every man, above the age of 21 years, who possesses any immovable property to the value of £50, or who rents any such property to the yearly value of £10, within any electoral district, and who is duly registered, is entitled to vote at the election of a member for such district. Those qualifications were not amended until 1883 (Law No. 2 of 1883), and, therefore, in 1881, applied to Mr. Green. Now, the first immovable properties in Natal, with which he was connected, were the two pieces of leased land near to the Drakensberg, in the Newcastle district. Those leases were produced by Mr. Green at the trial, and are now before me: the date upon each of them is September 20th, 1882: they are signed by Theophilus Shepstone, q.q. Richard Green, M.L.C. Mr. Green's name is not contained in the voters' lists for 1879, 1880, 1881. It appears for the first time in the list published in the Government Gazette of August 22nd, 1882. It thus appears to be clear that Mr. Green was elected to the 9th Council and attended its 2nd and 3rd sessions, when he was not possessed of a voter's qualifications required by our Charter, and was, therefore,

ineligible as a member. It is singular, too, that these leases should be signed q.q. Richard Green, M.L.C., at a Nov. 1, 2, 28. date 6 months after the dissolution of this 9th Council, and The Newcastle Election Petition. 11th Council met on July 5th, 1883, but Mr. Green was not elected thereto until the following year, when he took his seat at the second session on June 12th, 1884: that session lasted until September 26th following. The third and last session commenced in June, 1885, and terminated on the following September 24th. I understand that in the interval between the second and third sessions Mr. Green returned to his home in the Orange Free State. Thus, when in attendance as member of the 11th Council, Mr. Green resided within the Colony six months, but not It is not necessary that I should make continuously. further comment upon the above-mentioned elections of Mr. Green to the Legislative Council. Those elections, and the oath of allegiance taken by him, do not constitute a compliance with the requirements of the Imperial Act, as to re-admission to British nationality, or with those of our local Law of Naturalisation, No. 23, 1874.

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In my opinion, therefore, Mr. Green, having become a statutory alien under the Imperial Act of 1870, and not having complied with the requirements of the Natal Law of Naturalisation, No. 23 of 1874, has become an alien within the meaning of that term in the 12th Clause of our Charter of July 15th, 1856. As such he is not qualified to vote at any election within the Colony. By the 13th Clause no person other than a duly qualified elector can be elected a member of the Legislative Council. It follows. therefore, that, in my opinion, Mr. Green is ineligible as such member.

Even if it were conceded that he had been duly elected, and that he was not an alien within the meaning of our Charter, I am of opinion that his seat would be vacant under the 18th Section of the Charter.

I make no formal order on this alternative case against the first respondent, Mr. Green, inasmuch as, on the main case against both respondents, I have declared that the election is null and void.

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APPENDIX A.

TRANSLATED EXTRACTS FROM ORANGE FREE STATE LAWS AND OTHER DOCUMENTS.

CHAPTER II.

Burger Service.

2. All burgers, so soon as they have attained the full age of sixteen years, and all those who have acquired the burger-right at a later time of life, are bound to cause their names to be inscribed by the field-cornet under whom they have their place of residence, and are subject to burger service till the full age of sixty years.

CHAPTER III.

Qualification of Voters.

- 3. All burgers who have attained the age of eighteen years are competent to exercise the right of voting for the election of field-commandants and field-cornets.
- 4. All major burgers are qualified for the election of members of the Volksraad and of the States President:—
 - (a) Who were born in the State.
 - (b) Who have unencumbered immovable property registered in their names of the value of one hundred pounds sterling.
 - (c) Who are lessees of immovable property which has a yearly rent of at leat thirty-six pounds sterling.
 - (d) Who have a fixed yearly income of at least two hundred pounds sterling.
 - (e) Who are the owners of movable property to the value of at least three hundred pounds sterling, and and have resided at least three years in the State.

CHAPTER VIII.

The Military System.

- 50. The field-cornets shall be elected by and from the burgers of their wards by a majority.
- 51. A field-commandant shall be elected for each district by and from the burgers thereof.
- 52. The whole of the field-commandants and field-cornets who are combined in a commando shall elect from themselves, in the event of war, their own commandant-general,

which general must then receive his instructions from the States President.

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- 53. The whole of the commandants and field-cornets The Newcastle have the right, during the course of war, when they find reasons therefor, to dismiss the commandant-general, elected by them, and appoint another, in which event they shall give notice thereof to the President, who, on receipt of such notice, and finding the reason stated well founded, shall appoint a day on which a new election shall take place.
- 54. After the war no commandant-generalship shall any longer exist.
- 55. The field-cornets must be residents in their own wards, and possess landed property therein.
- 56. The field-commandants must be residents in their own districts, possess immovable property to the amount of two hundred pounds sterling, and have resided one year in the country.

CHAPTER XL.

Liability to Service, Equipment, Munitions of War.

- 28. All inhabitants between sixteen and sixty years of age, who have no legal reasons for excuse, are subject to the commando service, but youths under eighteen years of age shall not be called upon to perform commando service unless necessity demands this.
- 32. Members of the Volksraad and of the Executive Council, salaried civil officials, students of divinity, and persons suffering from bodily defects, which render them unfit for commando service, shall be free from personal commando service, but shall be subject to the commandeering of necessaries. Under civil officials are not included field-cornets, assistant field-cornets, and commandants. Teachers, of whatever kind they may be, shall be freed from all contributions for commandoes, as well as from personal service. When a member of the Executive Commission, if any shall be appointed, or of the Executive Council, or any member of the Volksraad, is absent from his house in attendance at the meeting of the Raad, no field-cornet or other military officer shall have right, during such absence, to commandeer the manager of his farm to go on commando, or perform any other burger service.
- 37. Every white person of the male sex in the Orange Free State from sixteen to sixty years of age, except those

1892. October 31. Nov. 1, 2, 28. The Newcastle Election Petition. who reside in district villages, shall be bound to be at all times provided with a horse, saddle, and bridle, a gun in good order, as also at least half a pound of powder, thirty bullets or a proportionate number of cartridges, and provisions for eight days. Every white person of the male sex in district villages, from sixteen to sixty years of age, shall at all times be bound to be provided with a gun in good order and at least half a pound of power, as also thirty bullets, and thirty percussions, or a proportionate number of cartridges, and, whenever called up for active service, with provisions for eight days. At times of commandoes they must be further provided with a horse, saddle, and bridle.

EXTRACTS FROM FREE STATE LAW.

CHAPTER IX.

THE LAW RESPECTING JUSTICES OF THE PRACE

Section 1.—Respecting Justices of the Peace in general

- 1. The States President has the power to appoint from time to time, as circumstances may require, persons whom he may consider capable and fitted thereto as Justices of the Peace for any town or village, or for any ward, or for any district, or for the whole State; such appointment is always made for the period of three years, unless during that time he may have well-grounded reasons for depriving such Justices of the Peace of their office.
- 2. The Justices of the Peace on acceptance of their office shall make an oath or promise before a Landdrost or Justice of the Peace, and at the same time sign the same in writing, which writing shall be sent by the Landdrost or Justice of the Peace to the Government Secretary for custody.

The oath or promise is to the following tenor:-

"I swear (or 'I solemnly declare that the making of an oath is, according to my religious convictions, unlawful, and I solemnly declare and promise') that I will be faithful to this State and the Government thereof; and that I will diligently, and to the best of my ability, without favour or prejudice, perform all the duties entrusted to me as Justice of the Peace (special or resident Justice of the Peace, as the case may be), and that I shall obey and support the Laws of this State. So truly help me God' (or, 'that I promise')."

3. The Government Secretary shall keep at his office a list of the officiating Justices of the Peace with a statement of their places of residence, as also the written proofs of their making oath, and of the date of their appointment.

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- 4. The appointment, dismissal, or resignation of Justices of the Peace, shall be published in the Government Gazette.
- 5. The Justices of the Peace shall be subordinate Magistrates within the limits of the places for which they shall have been appointed, and, as such, entitled and bound to carry out the powers specified and granted to Magistrates respecting arrest in the second section of Chapter VIII. (the law respecting criminal procedure) or such law respecting criminal procedure as shall be hereafter enacted.

The warrants granted by Justices of the Peace shall, so far as the circumstances permit, be drawn up in accordance with the forms contained in the schedule annexed to said chapter, the words "in the Landdrost's Court" being read "Justice of the Peace's Court" or "Special or Resident Justice of the Peace's Court" (as the case may be).

6. Any person refusing or neglecting to obey the lawful order of any Justice of the Peace for the arrest of any disturber of the peace, transgressor, or criminal, shall be liable to a penalty not exceeding two pounds and ten shillings sterling, and in default of payment to imprisonment not exceeding twenty-four hours.

That punishment may, on complaint and trial, be imposed by any of the Courts of Law of this State, or by any Justice of the Peace with special powers or Resident Justice of the Peace as hereafter provided in this law.

7. All Justices of the Peace are competent to cause sworn and other declarations, as provided by the law to be made before themselves, in villages or towns where he resides, even when there is a Landdrost in that village or town.

Section IV.—General Provisions.

- 26. All gaolers, prison warders, field-cornets, and other officers of the law are hereby charged to yield obedience and to carry out all warrants issued by any Justice of the Peace for the incarceration and keeping in custody of all persons mentioned in such warrants until they shall be released by lawful authority.
- 27. No person shall be entitled to institute any action or obtain a judgment for making good of damages against

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The Newcastle Election Petiany Justice of the Peace, in consequence of any act done or performed by him as Justice of the Peace, nor against any field-cornet, gaoler, police officer, or other officer of the law, nor any private person in consequence of any act done and performed by any of them in the execution of any warrant or verbal order of any Justice of the Peace, unless on the trial of the case it shall be clearly proved, first, that the plaintiff in such case or action shall have caused a written notice, under his own signature or that of his legally empowered attorney or agent, to be served on such Justice of the Peace or other defendant, personally, or at his last-known place of residence, at least two months before the signing of the summons, stating his intention of instituting such cause or action, and stating the circumstances on which he founds such action; and, secondly, it must be proved that the defendant acted wilfully and from hatred or bad feeling, and it shall not be allowed to the plaintiff to prove any other facts or to plead them on the trial of the cause except such as were mentioned in the And whenever at the trial of the cause it shall appear that the plaintiff has neglected to comply literally herewith, the cause shall, without any further investigation, be declared unreceivable and dismissed, and the plaintiff condemned to pay the full costs, which costs shall be taxed as between attorney and client, and not as between parties.

- 28. Whenever the plaintiff in such action against any Justice of the Peace shall obtain a judgement, and in case the judge before whom the process shall be heard shall certify in open court, or on the records, that the wrong on which such action was instituted, was done wilfully and maliciously, the plaintiff shall be entitled to apply for, and obtain, double costs of the process.
- 29. No action shall be brought against any Justice of the Peace for anything done by him in the execution of the duties in connection with his office, nor against any constable or other officer or person acting by order of any Justice of the Peace, unless such action shall be commenced within six months after the commission of the act.
- 30. Justices of the Peace residing in villages in which a Landdrost is placed are hereby deprived of the right of carrying out, within the limits of such village, the provisions of this chapter (except the provisions of Article 7), but they shall be entitled to support and carry out the same in case of absence, though default or otherwise, of the Landdrost or his substitute.

DISTRICT OF VREDE.

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No.	Farm.	In Extent.	Owner.
700 521	Amelia Allandale	5,003 morgen and 10 ∏ roods. 6,252 morgen and 177 ∏ roods.	Richard Allan Green. Richard Allan Green.

DISTRICT OF HARRISMITH.

366	Quebec	2,424 morgen	J. D. Palmer and Richard
370	Hamilton	3,809 morgen	Allan Green Do. Do.
368	Loronto	3,978 morgen	

I certify that the above farms are registered as above stated, and that Richard Allan Green is a burger of this State, and, as such, registered in the list of voter burgers.

L.S.

(Signed) Chas. Warden, Landdrost.

I, Zackarias Johannes de Beer, sworn appraiser for the Government of the Orange Free State, hereby certify that the immovable properties registered in the name of Richard Allan Green, and situate in the districts of Vrede and Harrismith, Orange Free State, have a value of more than one hundred and fifty pounds sterling.

I further certify that the value of these properties is at least ten thousand pounds sterling.

(Signed) Z. J. DE BEER, Sworn Appraiser,

Harrismith, 14th September, 1892.

I, Landdrost of Harrismith, hereby certify that Zackarias Johannes De Beer, who signed the above document, is a sworn appraiser for the Government of the Orange Free State.

L. S.

(Signed) CHAS. WARDEN, Landdrost,

Har sm th.

Harrismith, 14th September, 1892.

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LIST OF VOTER BURGERS IN THE ORANGE FREE STATE.

WARD OF KLIP RIVER.

Names.	Christian Names	Occupation.	Residence.
Adendorff Green	Hermanus Richard Allan		Brudershoek Allandale

A true extract from list of voter burgers of the Orange Free State.

(Signed) CHAS. WARDEN, Landdrost.

GOVERNMENT GAZETTE OF THE ORANGE . FREE STATE.

Bloemfontein, January 8th, 1879.

PROCLAMATION.

Whereas the Honourable the Volksraad, on the 24th of June last, has passed the following resolution, on the motion of Mr. Snyman, supported by Mr. D'Wet:—

"His Excellency the State President is authorised to revoke at any time, to be determined by him, all appointments of Justices of the Peace that have been made, and to make and publish a new appointment of Justices of the Peace for the whole State. Justices of the Peace so appointed to vacate office three years after their appointment."

Now, therefore, I, Johannes Henricus Brand, President of the Orange Free State, have, in accordance with the aforesaid resolution, determined it right to revoke from and after the 23rd day of this month (January, 1879), all appointments of Justices of the Peace heretofore made, and to nominate and appoint as Justices of the Peace from and after the said date the following persons, namely:—For the district of Harrismith—Richard Allan Green, Neil J. McKenzie, Frans Van Reenen, Jac Truter, President of the Land Commission; Dr. William Michael Beor, Charles John Pritchard, the Resident Justice of the Peace at Frankfort; and the field-cornets in their different wards.

The Justices of the Peace hereby nominated and appointed are requested to take the oath of office in accordance Nov. 1, 2, 28. with the provisions of Articles 1 and 15 of Ordinance No. The Newcastle 2, 1870, before the landdrost of their district, who shall Election Petithen deliver to them the appointment, signed by the State tion. President and covered with State seal, and the landdrost's clerks of the respective districts are directed to inscribe the names and residences of all the Justices of the Peace so appointed in a book to be kept by them for that purpose, as is enacted by Article 1 of the said ordinance.

Given under my hand and seal at Bloemfontein on this 6th day of the month of January, in the year of our Lord

one thousand eight hundred and seventy-nine.

J. H. Brand, State President. By order (signed) O. J. TRUTER (J. A.'s son),

the Government Secretary.

FORM OF OATH.

ARTICLE 15, ORDINANCE No. 2, 1870.

I, Richard Allan Green, hereby declare and swear to be faithful to the Government of the Orange Free State, and that I, as Justice of the Peace, shall do equal right to the rich and to the poor, to the best of my competency and ability in accordance with the laws and customs of the Orange Free State, and the ordinances and proclamations thereof, and that I shall give no advice in any matter of dispute pending before me, nor impede the course of justice for any gifts or other reasons, but I shall well and truly perform my duty as Justice of the Peace, without partiality, favour, or affection.

So truly help me God Almighty.

Article 1, Ordinance No. 2, 1870.

Meeting held in the district of Harrismith, on the farm of the burgher P. J. L. Koen, in the field-cornetcy of Klip River, on the third day of November, 1876, for the election of a member of the Raad for the ward of Klip River.

Present:—Mr. J. L. de Villiers, Landdrost, Chairman, together with Messrs. Matthys, John Koen, and Johannes Hendrik Cloete, as members of the committee elected by the public.

1892.

October 31

October 31. Nov. 1, 2, 28. The Newcastle Election PetiWe, the undersigned, duly qualified voters declare that we record our votes for Mr. Cornelis Janse de Villiers, junr., as member of the Raad for the ward of Klip River, in the district of Harrismith.

Signatures (Signed) J. H. de Jager.
(Signed) A. B. Lombaard.
(Signed) C. J. Odendaal.

* * * *
(Signed) S. Odendaal, q.q. R. A. Green.

* * * *

We, the undersigned, certify that the transactions of the meeting above mentioned are duly noted in the above report or minute, and that the electors duly qualified to vote being present have signed the election list with their own hands, and those absent with their agents duly qualified thereto.

(Signed) J. L. DE VILLIERS, Chairman.

M. J. KOEN
J. H. CLOETE

Members.

Copy conform to original at present in my archives—Bloemfontein, 17/10/92.

(Signed) J. E. Van Hoytema, Secretary, Volksraad.

QUALIFICATION.

I, the undersigned, Richard Allan Green, nominate in my place the burgher S. Odendaal, to record at the meeting on the 3rd November, proximo, at the farm of Mr. P. J. L. Koen, my vote as burgher, for M. C. J. de Villiers, jun., as member of the Raad for the ward Klip River in the district of Harrismith.

Thus granted on the farm Allenvale, the 24th day of October, 1876.

(Signed) R. A. GREEN.

As witnesses:

(Signed) HENRY GREEN.

CHARLES GUSTROOT.

Copy conform to the original at present in my archives.

—Bloemfontein, 17th October, 1892.

(Signed) J. E. VAN HOYTEMA, Acting Government Secretary.

APPENDIX B.

An Act to amend the Law relating to the legal condition of Nov. 1, 2, 28. Aliens and British subjects [12th May, 1870.]—" The The Newcastle Election Peti-Naturalisation Act, 1870." 33 Vic. C. 14 (not printed tion. with this report.)

APPENDIX C.

NO. 22.

EXTRACT OF A DESPATCH FROM GOVERNOR THE HON. G. CATHCART TO THE RIGHT HON. THE SECRETARY OF STATE FOR THE COLONIES.

[No. 47.]

Grahamstown, January 13th. 1853. (Received, February, 28th, 1853.)

(Answered No. 39, March 14, 1853, page 118.)

"My military Despatch by this post, and its enclosures, will place you in possession of the principal affairs of the Orange River Territory.

"But there are some other important matters connected with that portion of Her Majesty's South African possessions placed under my responsibility which it is absolutely necessary I should bring to your notice, with a view to obtaining some decision of Her Majesty's Government, and some definite instructions for my guidance respecting them. When I relieved Sir H. Smith at Kingwilliamstown on the 9th April of last year, I had only an opportunity for a few hours' conversation, and, as you are aware, the state of the war in Kaffraria, the Hottentot rebellion, and the Timbookie insurrection, besides colonial policy in respect to the Constitution Ordinances, were sufficient to occupy my attention.

"It was by accident that I discovered that although the Orange River Crown possession was still governed according to the proclamation of sovereignty, there were extant in the Colonial Office at Capetown letters patent subsequently sent out, with instructions, forming in fact the constitution of this said Crown possession, under the new designation of the 'Orange River Territory.'

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"I have endeavoured, in vain, to obtain any clue as to cause or authority for the suppression of these letters patent, as there is no copy of any letter on the subject either at Kingwilliamstown or Capetown.

"Observing that in your despatches the on subject of this possession of the Crown you invariably use the term 'Territory,' and not 'Sovereignty,' as it was called in the proclamation, I conclude that Her Majesty's Government is under the impression that these letters patent are in force, and I know no power which would authorise me to set them aside or disobey them; but knowing that the question of retaining or abandoning the Sovereignty was still under the deliberation of Her Majesty's Government, I have endeavoured to make as little change in the existing state of things as possible.

"On my recent expedition beyond the Orange River I observed no excitement whatever among the burgher population respecting the great question of retaining or abandoning the obligation assumed by Her Majesty's Government in respect to the Sovereignty, and only so much anxiety on the part of those of Colonial or British origin, who are almost all land jobbers, possessed of title to numerous farms which they hold unoccupied with a view to profitable speculation, as was concentrated in their own particular interests.

"Under these circumstances, I am convinced that things cannot remain long as they are, and to obviate the risk of more serious consequences it is necessary that Her Majesty's Government should come to a decision, either to abandon the Sovereignty, or to authorise the letters patent being carried out to their full extent, by the appointment of a Lieutenant-Governor, as therein ordained, and provide a force of not less than 2,000 men, under a Major-General, at hand, to support his authority, and enable him to keep in check, not only the burghers of questionable loyalty who inhabit the territory, and petty tribes, being Her Majesty's adopted subjects, but the far more formidable Transvaal emigrants, and the too powerful and warlike chiefs of the Native aboriginal tribes of the Zulus and Basutos, Panda and Moshesh.

"In either case, that of abandonment or of government, I must most earnestly and conscientiously assure you of my total inability to perform the difficult and delicate task of carrying out the details of such measures, which are entirely of a political or diplomatic character, and require knowledge and experience in that respect which I do not

possess, even if a distance of 400 miles, and my other responsibilities, did not place it beyond my power.

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"My opinion, therefore, which I humbly submit, is, that The Newcastle in either case a professed and able statesman of experience, possessing the confidence of Government, and a knowledge of their views, as well of international law and policy, should be sent out from England at any expense, either as Chief Commissioner, in the one case, or as Lieutenant-Governor in the other, with instructions to proceed immediately towards the accomplishment of whichever course may be determined upon, and it is the only safe and politic expedient, that the public officer so selected should have no previous connection with the colony.

"Of my two Assistant Commissioners, Mr. Owen is most zealous and active, and Mr. Ebden, recently appointed, from his legal knowledge and his great abilities, as well as his zeal, prudence, and assiduity, has proved of the greatest use to me, and both would prove so to the statesman who I propose to you to appoint as Chief Commissioner.

"But the appointment of some more fit person to relieve me of this part of my responsibilities, which is entirely beyond my powers, is indispensable. He should be entirely independent of me in political matters, but he should have all the advice, support and information which it is in my power to give him.

"The fate of great and powerful future nations is involved. in the course of policy which now must be adopted, one way or the other, and a fault in a single elementary stipulation or enactment may involve international difficulties, the inconvenient consequences of which are incalculable, and may be irretrievable."

Enclosure in No. 22.

MEMORANDUM.

Attorney-General's Office, Capetown, November 8th, 1852.

- 1. I send herewith letters patent under the great seal, and an instrument under the Royal signet and sign manual, being respectively the commission and instructions of the Governor of the Orange River Territory.
- 2. His Honour the Lieutenant-Governor having communicated to me the substance of a letter received by him from His Excellency the Governor, desiring to be furnished with Sir Harry Smith's commission as High Commissioner of the Orange River Sovereignty, I mentioned to his

1892. October 31. Nov. 1, 2, 28. The Newcastle Election Petition. Honour some points connected with the nature and operation of his Excellency's several authorities, which points his Honour seemed to wish I should put down on paper, in order that he might submit them to His Excellency.

- 3. Previous to the appointment of Sir Henry Pottinger to this Government, there had never been any such officer as a High Commissioner, and with Mr. Woosnam (who had been with him in China) as secretary to him in his capacity as High Commissioner. When Sir Harry Smith relieved Sir Henry Pottinger, he also brought out a commission as High Commissioner, and Mr. Southey became his secretary, an appointment which, after a time, Sir Harry discontinued; and upon the recall of Sir Harry Smith his Excellency General Cathcart received, in his turn, a commission as High Commissioner, which commission will be forwarded to him by the Lieutenant-Governor by the same post which carries this memorandum. There is little difference in words, and no difference in legal effect, between any of the three commissions as High Commissioner which have thus been issued. All of these commissions are strictly personal, and his Excellency the present Governor does not in any way act under the commission of Sir Harry Smith. He acts under his own commission, which is the same as Sir Harry Smith's was.
- 4. The commission as High Commissioner does not, as will be seen, refer to the Orange River Sovereignty at all. General Cathcart's is the same as Sir Harry Pottinger's, and when Sir Henry Pottinger's was framed there was no Orange River Sovereignty to refer to. In truth this commission as High Commissioner did no more than accredit a negotiator for diplomatic purposes. The High Commissioner's commission was one for settling and adjusting the affairs of territories adjacent to the Cape Colony. It plainly was not meant to confer any authority with regard to any British territory; nor, in my opinion, did it bestow any manner of authority for declaring British sovereignty over any native territory. Sir Harry Smith, in 1848, declared British sovereignty, and in his proclamation of the 3rd February of that year appears to declare it in his capacity as High Commissioner, rather than that of Governor of the Cape, a course of proceeding natural enough, because, as Governor of the Cape, his authority was strictly bounded by the colonial limits, whilst, as High Commissioner, he seemed to have some sort of extra-colonial authority. But his act after all depended for its authority upon the ratification of the Crown, and was not done in the exercise of any actual power bestowed upon him by any of his com-

missions, civil or millitary. Sir Harry Smith was, I believe, quite aware of this, and though he continued by the name Nov. 1, 2, 28. and style of High Commissioner to govern the Orange The Newcastle River Sovereignty, he did so because he was thereby sup- Election Petiplied with the most convenient title by which he could be tion. designated, and not because he considered that his commission as High Commissioner empowered him to proclaim the Queen's dominion over native territories, or to legislate for those territories when thus made British.

October 31.

- 5. Letters patent dated at Westminster the 22nd March. 1851, were sent out, and are now before me, by which the Orange River Sovereignty is made a distinct British settlement, the Governor of which is to be the Governor of the Cape for the time being. These letters patent, with accompanying instructions, arrived here in the thick of the Kafir war. The conjuncture was deemed an unfavourable one for publishing or acting on them. They were therefore laid aside till there should arrive a more convenient season for promulgating them. That more convenient season never came, for Earl Grey, in his Despatch, No. 698, of the 21st of October, 1851, instructed Sir Harry Smith that "the ultimate abandonment of the Orange River Sovereignty should be a settled point in our policy." To have published the letters patent after this would have been obviously improper, and the result has been that these letters patent have never yet been acted upon, and that the government of the Sovereignty has continued to be administered precisely as if they had never been issued. The country continues to be called the Orange River "Sovereignty," whilst the letters patent term it the Orange River "Territory." The ordinances for its government purport to be enacted by the High Commissioner, whilst according to the letters patent they should have run in the name of the Governor of the Orange River Territory. And, if my memory do not deceive me, the present Legislative Council of the "Orange River Sovereignty" exceeds in number and perhaps in privileges the only Legislative Council authorised by the letters patent and accompanying instructions.
- 6. Whether, under these circumstances, these letters patent and instructions should now be promulgated or acted upon, it will be for his Excellency to determine. My own idea is, that it will be better not to promulgate or act upon them. It would seem to be clear that we must soon either abandon the Sovereignty or grant to it representative institutions, and in either case the bringing forward at present of instruments so long in abeyance could serve, I

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think, no useful purpose. There is no fear whatever that his Excellency's title as High Commissioner will be drawn into the question.

7. There also exist, I may observe, letters patent and instructions constituting British Kaffraria a British settlement, with the Governor of the Cape as its Governor. These instructions bear date the 16th December, 1850, just eight days before Colonel Mackinnon's patrol was fired upon in the Keiskama, and the Kafir war began. They have, of course, not been promulgated, and the High Commissioner continues to be the name under which his Excellency transacts in those territories any business of a non-military character.

(Signed) W. PORTER.

APPENDIX D.

Articles of Convention entered into between Sir George Russell Clerk, Knight Commander of the most Honourable Order of the Bath, her Majesty's Special Commissioner for settling and adjusting the affairs of the Orange River Territory, on the one part, and the undermentioned Representatives, delegated by the inhabitants of the said territory.

For the District of Bloemfontein:—George Frederik Linde, Gerhardus Johannes Du Toit, Field-cornet; Jacobus Johannes Venter, Dirk Johannes Kramfort.

For the District of Smithfield:—Josias Philip Hoffman, Hendrik Johannes Weber, Justice of the Peace and Field-Commandant; Petrus Arnoldus Human, Jacobus Theodorus Snyman, Field-Commandant; Petrus van der Walt, sen. (absent on leave).

For Sannah's Poort:—Gert Petrus Visser, Justice of the Peace; Jacobus Groenendaal, Johannes Jacobus Rabie, Field-cornet; Esias Rynier Snyman, Charl Petrus Du Toit, Hendrik Lodewicus Du Toit.

For the District of Winburg:—Frederik Peter Schnehage, Mathiys Johannes Wessels, Cornelis Johannes Frederik Du Plooy, Frederik Petrus Sennekal, Field-cornet; Petrus Lafras Moolman, Field-cornet; Johan Izaak Jacobus Fick, Justice of the Peace.

For the District of Harrismith:—Paul Michiel Bester, Justice of the Peace; Willem Adrian van Aardt, Fieldcornet; Willem Jurgens Pretorius, Johannes Jurgens Bornman, Hendrik Venter (absent on leave), Adriaan Hendrik Stander,

On the other part.

ARTICLE I.—Her Majesty's Special Commissioner, in entering into a convention for finally transferring the Government of the Orange River Territory to the Representatives delegated by the inhabitants to receive it, guarantees, on the part of her Majesty's Government, the future independence of that country and its government; and that, after the necessary preliminary arrangements for making over the same between her Majesty's Special Commissioner and the said Representatives shall have been completed, the inhabitants of the Territory shall then be free. And that this independence shall, without unnecessary delay, be confirmed and ratified by an instrument, promulgated in such form and substance as her Majesty may approve, finally freeing them from their allegiance to the British Crown, and declaring them, to all intents and purposes, a free and independent people, and their Government to be treated and considered thenceforth as a free and independent Government.

ARTICLE II.—The British Government has no alliance whatever with any Native Chiefs or Tribes to the northward of the Orange River with the exception of the Griqua Chief, Captain Adam Kok; and her Majesty's Government has no wish or intention to enter hereafter into any treaties which may be injurious or prejudicial to the interests of the Orange River Government.

ARTICLE III.—With regard to the Treaty existing between the British Government and the Chief, Captain Adam Kok, some modification of it is indispensable. Contrary to the provisions of that Treaty, the sale of lands in the Inalienable Territory has been of frequent occurrence, and the principal object of the Treaty thus disregarded. Majesty's Government therefore intends to remove all restrictions preventing Griquas from selling their lands; and measures are in progress for the purpose of affording every facility for such transactions, the Chief Adam Kok having, for himself, concurred in and sanctioned the same; and with regard to those further alterations arising out of the proposed revision of relations with Captain Adam Kok, in consequence of the aforesaid sales of land having from time to time been effected in the Inalienable Territory, contrary to the stipulations of the Maitland Treaty, it is the intention of her Majesty's Special Commissioner, personally, without unnecessary loss of time, to establish the affairs in Griqualand on a footing suitable to the just expectations of all parties,

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ARTICLE IV.—After the withdrawal of her Majesty's Government from the Orange River Territory, the new Orange River Government shall not permit any vexatious proceedings towards those of her Majesty's present subjects remaining within the Orange River Territory, who may heretofore have been acting under the authority of her Majesty's Government, for, or on account of, any acts lawfully done by them, that is, under the law as it existed during their occupation of the Orange River Territory by the British Government; such persons shall be considered to be guaranteed in the possession of their estates by the new Orange River Government. Also, with regard to those of her Majesty's present subjects who may prefer to return under the dominion and authority of her Majesty, to remain where they now are, as subjects of the Orange River Government, such persons shall enjoy full right and facility for the disposal and transfer of their properties, should they desire to leave the country, under the Orange River Government, at any subsequent period within three years from the date of this Convention.

ARTICLE V.—Her Majesty's Government and the new Orange River Government shall, within their respective territories, mutually use every exertion for the suppression of crime, and keeping the peace, by apprehending and delivering up all criminals who may have escaped or fled from justice either way across the Orange River; and the Courts, as well the British as those of the Orange River Government, shall be mutually open and available to the inhabitants of both territories for all lawful processes. And all summonses for witnesses, directed either way across the Orange River, shall be countersigned by the Magistrates of both Governments respectively to compel the attendance of such witnesses when and where they may be required; thus affording to the community north of the Orange River every assistance from the British Courts; and giving, on the other hand, assurance to such colonial merchants and traders as have naturally entered into credit transactions in the Orange River Territory during its occupation by the British Government, and to whom, in many cases debts may be owing, every facility for the recovery of just claims in the courts of the Orange River Government. And her Majesty's Special Commissioner will recommend the adoption of the like reciprocal privileges by the Government of Natal, in its relations with the Orange River Government.

ARTICLE VI.—Certificates issued by the proper authorities, as well in the Colonies and possessions of her Majesty as in the Orange River Territory, shall be held valid and suf-

ficient to entitle heirs of lawful marriages, and legatees, to receive portions and legacies accruing to them respectively, Nov. 1, 2, 28. either within the jurisdiction of the British or Orange River Government.

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tion.

ARTICLE VII.—The Orange River Government shall, as hitherto, permit no slavery or trade in slaves, in their territory north of the Orange River.

ARTICLE VIII.—The Orange River Government shall have freedom to purchase their supplies of ammunition in any Britssh Colony or possession in South Africa, subject to the laws provided for the regulation of the sale and transit of ammunition in such British Colonies and possessions; and her Majesty's Special Commissioner will recommend to the Colonial Governments that privileges of a liberal character, in connection with import duties generally, be granted to the Orange River Government, as measures in regard to which it is entitled to be treated with every indulgence, in consideration of its peculiar position and distance from the sea ports.

ARTICLE IX.—In order to promote mutual facilities and liberty to traders and travellers, as well in the British possessions as in those of the Orange River Government, and it being the earnest wish of her Majesty's Government that a friendly intercourse between these territories should at all times subsist, and be promoted by every possible arrangement, a Consul or Agent of the Brtish Government whose especial attention shall be directed to the promotion of these desirable objects, will be stationed within the Colony, near to the frontier, to whom access may readily at all times be had by the inhabitants on both sides of the Orange River, for advice and information as circumstances way require.

Thus done and signed at Bloemfontein, on the twentythird day of February, one thousand eight hundred and fifty-four.—(Signed) George Russell Clerk, K.C.B., her Majesty's Special Commissioner.

(Signed) Josias Philip Hoffman, President; Fredrik Linde, G. J. Du Toit, Field-cornet; J. J. Venter, D. J. Kramfort, H. J. Weber, Justice of the Peace and Field-Commandant; P. A. Human, J. T. Snyman, late Field-Commandant; G. P. Visser, Justice of the Peace; J. Groenendaal, J. J. Rabie, Field-cornet; E. R. Snyman, C. P. Du Toit, H. L. Du Toit, F. P. Schnehage, M. J. Wessels, C. J. F. Du Plooy, F. P. Sennekal, Field-cornet; P. L. Moolman, Field-cornet; J. I. J. Fick, Justice of the Peace;

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P. M. Bester, Justice of the Peace; W. A. Van Aardt, October 81. F. M. Bester, Justice of the Feace; W. A. van Aardt, Nov. 1, 2, 28. Field-cornet; W. J. Pretorius, J. J. Bornman, A. H. Stander.

True Copy.—John Burnett.

APPENDIX E.

At the Court at Buckingham Palace, the 30th day of January, 1854.

The Queen's most Excellent Majesty in Council.

Whereas Lieutenaut-General Sir Henry George Wakelyn Smith, administrator of the government of the colony of the Cape of Good Hope in South Africa, and Her Majesty's High Commissioner for the settling and adjustment of the affairs of the territories in Southern Africa, adjacent and contiguous to the eastern and north-eastern frontier of the said colony, did, on the 3rd day of February, 1848, by proclamation under his hand and the public seal of the colony of the Cape of Good Hope, proclaim and make known the sovereignty of Her Majesty over the territories north of the Great Orange River, including the countries of Moshesh, Moroko, Moletsani, Sinkonayala, Adam Kok, Gert Taaybosch, and of other minor chiefs, so far north as to the Vaal River and east to the Drakensberg or Quathlamba And whereas the said Sir Henry George mountains: Wakelyn Smith did, on the 8th day of March in the same year, by another proclamation under his hand and the public seal of the said Colony, proclaim, declare and make known the system contained in the said proclamation for the government of the territory between the Orange and Vaal Rivers, described as being then under the sovereignty of her Majesty:

And whereas by letters patent under the great seal of the United Kingdom of Great Britain and Ireland, bearing date the 22nd of March, 1851, her Majesty did, after reciting the first mentioned proclamation, ordain and appoint that the said territories therein described should thenceforth become and be constituted a distinct and separate government, to be admistered in her name and on her behalf by the Governor and Commander-in-Chief for the time being in and over her settlement of the Cape of Good Hope, otherwise as in the said letters patent is provided; and did by the said letters patent ordain and appoint that the said territories should thenceforth be comprised under and be known by the name

of the Orange River Territory; and did by the said letters patent, and by certain instructions under the sign manual bearing even date therewith, make further provision for the good government of the said territory! And whereas her Majesty did, by a commission under her royal sign manual and signet, bearing date at Buckingham Palace the 6th day of April, 1853, in the sixteenth year of her reign, appoint Sir George Russell Clerk, Knight Commander of the most Honourable Order of the Bath, to be her Majesty's Special Commissioner for the settling and adjustment of the affairs of the said territories as the Orange River Sovereignty:

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And whereas is has seemed expedient to her Majesty, by and with the advice of her Privy Council, to abandon and renounce for herself, her heirs, and successors all dominion and sovereignty of the Crown of the United Kingdom of Great Britain and Ireland over the territory aforesaid and the inhabitants thereof, and to order the withdrawal of all her officers and ministers, military and civil, from the said territory, to the intent that the said territory may become and remain from henceforward independent of the Crown of the said United Kingdom:

And whereas her Majesty has accordingly, by her letters patent under the great seal of the said United Kingdom, bearing even date herewith, revoked and determined the hereinbefore recited letters patent of the 22nd March, 1851:

And whereas there hath this day been laid before her Majesty in Council the draft of a proclamation to be promulgated in the said teritory, declaring the revocation of the said letters patent and the abandonment and renunciation of her dominion over the the said territory in manner aforesaid (a copy of which is hereunder written):

"ORANGE RIVER TERRITORY.

"PROCLAMATION.

"Whereas we have thought fit by and with the advice of our Privy Council, and in exercise of the powers and authorities to us in that behalf appertaining, to abandon and renounce for ourselves, our heirs and successors, all dominion and sovereignty of the Crown of the United Kingdom of Great Britain and Ireland over the territories designated in our letters patent of the 22nd March 1851, by the name of the Orange River Territory, and have revoked and determined the said letters patent accordingly: October 31.
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"We do for that end publish this our Royal Proclamation, and do hereby declare and make known the abandonment and renunciation of our dominion and sovereignty over the said territory and the inhabitants thereof. "Given, &c."

Her Majesty is therefore pleased by and with the advice of her Privy Council, to approve the said Proclamation, and to order, and in pursuance and exercise of the powers and authorities to her in that behalf appertaining, it is hereby ordered that the said Proclamation shall be promulgated by the said Sir George Russell Clerk on or before the first day of August next ensuing; and that upon and from and after such promulgation thereof all dominion and sovereignty of her Majesty over the said territory and the inhabitants thereof shall absolutely cease and determine, and her officers and ministers, military and civil, shall with all convenient speed be withdrawn from the said territory.

And the most noble the Duke of Newcastle, one of her Majesty's principal Secretaries of State is to give the necessary directions herein accordingly.

C. C. GREVILLE.

APPENDIX F.

Translations of oaths appearing, passim, in the Orango Free State Wetboek, 1854-1891.

OATH OF A JUDGE OF THE SUPREME COURT.

I do swear (or I do solemny declare) that I will be faithful to the State, will uphold its independence, and will maintain and observe the Constitution. I do declare that I have, neither directly nor indirectly, under any name or pretence whatever, given, or promised anything to any person whomsoever to obtain my appointment; that I will never accept or receive from or on behalf of any person any gift or present whatsoever who I know or supect has, or will have, any process or case; further, that I will fill my post with honesty and impartiality, without respect of persons, and that in the discharge of my duty, I will conduct myself as becomes an honourable and honest judge. So truly help me God Almighty (or this I promise and solemnly declare).

OF REGISTRAR OF SUPREME COURT.

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I do swear (or I do solemnly declare that the taking of Nov. 1, 2, 28. an oath is, according to my religious conviction, not permitted, and I do solemnly declare) that I will be faithful to the State, and that I will, with all fidelity and diligence, and without fear, favour, or prejudice, discharge the duties of my office as Registrar, and that I will not myself, or through anybody else, demand, or accept, for my own use or benefit any fee or remuneration for anything done by me in my said capacity, and that I will not myself take, or allow anybody else under me to take, any fees, or fees of office, excepting such as are allowed by law, and that I will faithfully account for the same. So truly help me God Almighty (or that I promise).

OATH OF LANDDROST.

I do swear (or I do solemnly declare that the taking of an oath is, according to my religious conviction, not permitted, and do solemnly promise) that I will be faithful to the State, and that I will administer justice as (acting) Landdrost according to the laws of the same; and that I will discharge the duties connected with my office honestly, uprightly, and impartially, without respect of person. truly help me God (or that I promise).

OATH OF JUSTICE OF THE PEACE.

I do swear (or I do solémnly declare that the taking of an oath is, according to my religious conviction, not permitted, and I solemnly declare and promise) that I will be faithful to this State and the Government of the same; that I will fulfil all the duties entrusted to me as justice of the peace, (special or resident Justice of the Peace) as the case may be) diligently and to the best of my ability and without favour or prejudice, and that I will obey and uphold the laws of this State. So truly help me God (or that I promise).

OATH OF LEGAL PRACTITIONERS.

I, A.B., do swear fidelity to the Government of the Orange Free State and its laws. I do promise to respect and obey those laws, and to conduct myself an honourable man accordingly, and faithfully to carry on my practice as (advocate, &c.) So truly help me God Almighty.

OATH OF SHERIFF.

I do swear (or I do solemnly declare that the taking of an oath is, according to my religious conviction, not perOctober 31.
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mitted, and I do solemnly promise) that I will be faithful to the State, and that I will diligently and faithfully discharge the duties of my office as (deputy) Sheriff; and that I will execute all warrants, summonses, and other orders or decrees entrusted to me, without fear favour or prejudice, for or against any person; and that I will not myself, or through anybody else employed by me, take or demand, or cause to be taken or demanded, any fee or remuneration, excepting such as is permitted or allow by law. So truly help me God Almighty (or that I promise).

OATH OF FIELD-CORNET.

I do swear (or I do solemnly declare that the taking of an oath is according to my religious conviction, not permitted, and do solemnly declare) that I will be faithful to the Government of the Orange Free State, and that as (fill in field-cornet, assistant field-cornet, temporarily acting field-cornet, as the case may be) for ward in the district of I will faithfully perform the duties connected with that office, to the best of my ability, without fear, favour, or prejudice for any person. So truly help me God (or that I promise).

OATH OF INTERPRETER OF THE SUPREME COURT.

I do swear (or solemnly declare) that I will be faithful to the State, that I will diligently and faithfully discharge the duties of my office as interpreter, and that in all languages with which I am acquainted, I will make a true interpretation to the best of my knowledge and ability, without fear, favour or prejudice, as becomes an honest interpreter. So truly help me God Almighty (or that I do solemnly declare).

OATH OR PROMISE OF LANDDROST'S CLERK.

I do swear (or I do solemnly declare that the taking of an oath is, according to my religious conviction, not permitted, and I do solemnly promise) that I will be faithful to the State, and that I will discharge the duties of my office as Landdrost's clerk, with all fidelity and diligence, and without fear, favour, or prejudice; and that I will not myself, or through anybody else, demand or accept for my own use or benefit, any fee or remuneration for anything done by me in my said capacity, and that I will not myself take, or allow anybody else under me to take, any fees, or fees of office, excepting such as are allowed by law, and that I will faithfully account therefor. So truly help me God Almighty (or that I promise).

APPENDIX G.

EXTRACTS FROM NATAL CHARTER,

JULY 15TH, 1856.

POWERS AND CONSTITUTION OF COUNCIL.

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- 11. Every man, except as hereinafter excepted, above the age of twenty-one years, who possesses any immovable property to the value of £50, or who rents any such property of the yearly value of £10, within any Electoral District, and who is duly registered in manner hereinafter mentioned, shall be entitled to vote at the Election of a Member for such District. When any such property as aforesaid is occupied by more persons than one, as proprietors or renters, each of such occupants, being duly registered, shall be entitled to vote in respect of such property, provided the value, or, as the case may be, the rent thereof, be such as would entitle each of such joint occupants to a vote, if equally divided among them.
- 12. Aliens, not having been naturalised by some Act of the Imperial Parliament, or of the Legislature of Natal, and persons who shall have been convicted of any treason, felony, or infamous offence, and shall not have received a free pardon, shall not be qualified to vote at any such Election.
- 13. No person shall be capable of being elected Member of the Legislative Council unless he shall be a duly qualified and registered Elector of some Electoral District in the Colony, nor unless he shall have been invited to become a Candidate for such Election, by at least ten Electors of the County or Borough which it is proposed he shall represent; nor unless such Requisition shall have been transmitted to the Resident Magistrate of the County or Borough, with a notification of the said Candidate's acceptance thereof, at least fourteen days before such Election is appointed to take place.

IV VACANCIES.

18. If any Member of the Legislative Council shall by writing under his hand, addressed to our said Governor, resign his seat in the said Council, or shall, without the permission of our said Governor first obtained, fail, during a whole Session, to give his attendance in the said Council, or shall take any oath, or make any declaration or acknowledgement of allegiance, obedience, or adherence to any Foreign State or Power, or shall do, concur in, or adopt,

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any act whereby he may become the Subject or Citizen of any such State or Power, or shall become a bankrupt, or an insolvent debtor, or a public defaulter, or be attainted of treason, or be convicted of felony, or any infamous crime, or shall, for the period of one month, remain party to any contract with the Government, or if any Elective Member shall accept any offer of emolument from the Government, his seat in the said Council shall thereupon become vacant

19. Whenever it shall be established, to the satisfaction of our said Governor, that the seat of any Elected Member of the Legislative Council has become vacant, our said Governor shall forthwith issue a Writ for the Election of a new member to serve in the place so vacated, during the remainder of the term of the continuance of such Council; but if any question shall arise respecting the fact of such vacancy, it shall be referred by our said Governor to the said Council, and shall be heard and determined by them.

V. CONDUCT OF BUSINESS.

- 20. No Member of the Legislative Council shall vote, or sit therein, until he shall have taken and subscribed the following Oath, before our said Governor, or some person authorised by him to administer such Oath:—
 - "I (A.B.) do sincerely promise and swear, that I will be faithful, and bear true allegiance to Her Majesty. So help me God!"

But every person authorised by Law to make a solemn Affirmation, or Declaration, instead of taking an Oath, may make such Affirmation or Declaration in lieu of the said Oath.

VIII. POWERS OF ALTERATION.

51. It shall be lawful for our said Governor, by any Law to be enacted by him, with the advice of the Legislative Council to be constituted under and by virtue of these presents, to repeal, alter, or amend, all or any of the provisions made by, or in virtue of, these presents, and to substitute other provisions in lieu thereof; provided that no such Law shall abridge the power hereinbefore reserved to our said Governor of reserving any Bill passed by the Legislative Council for the signification of our pleasure thereon, or the power reserved to us of disallowing any Law; and provided also, that every Law shall be reserved by our said Governor for the signification of our pleasure,

which shall diminish the Salary of any Officer holding office, or by which any alteration shall be made in any of the following particulars, namely:

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The respective numbers of the Elective and non-Elective Election Petition. Members of the Legislative Council.

The qualifications of the said Elective Members and of their Electors.

The Salaries annexed by the Reserved Civil Lists to the offices of Governor, Judge, and Secretary for Native Affairs, or the annual payment of Five Thousand Pounds for Native Purposes.

APPENDIX H.

Law 23, of 1874.—"The Naturalization Law, 1874," [not printed with this Report.]

APPENDIX I.

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- (2) Common Law liability. Goods lost while in charge of Railway Department. Alleged defective packing. Measure of damages.
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 - 2. In an action for the value of goods lost from a package entrusted to the Government Railway Department for conveyance by rail and delivery to the consignees, the damaged state of such package, the fact that it had been repaired, and the mode of packing, being known to the Railway officials, who accepted the case as being strong enough for the journey which it had to undergo, it appearing also that further injury to the case, resulting in the loss of part of its contents, occurred while it was in the custody of the Railway Department, Held: That a plea of contributory negligence by defective packing was no defence to the action.
 - 3. Where goods had been entrusted to a carrier by land for conveyance, and had been lost, and not replaced, HELD: That the measure of damage was the market value of the goods lost, such value being the prime invoice cost, with Customs dues, importation expenses, and importer's profits added. Ten per cent. over all expenses held to be a reasonable importer's profit.

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—(3). Liability of carrier by sea. Passengers' luggage. British ship trading to Natal from foreign Port. Contract, conditions of, and law applicable to.

In an action in respect of loss of passengers' luggage from a British ship voyaging from a foreign port to Natal, HELD (TURNBULL, J., dissentiente): That, the general rule being that the rights of parties have to be judged by the law of that country by which they may justly be presumed to have bound themselves, the law of the ship governed the case, and not the law of the place of performance.

- (2) Held, further: That the contract between the parties was defined by the passenger ticket given by the defendants to the passenger, and the printed conditions, endorsed and referred to on the face thereof, in the English language.
- (3) Held, further: That the defendants being bound to place passengers' luggage in the wharf-shed at Port Natal, or at least to land it. there was an implied condition in the contract to that effect; and that, as the defendants had compelled the plaintiffs to leave the ship, they became responsible for the safety of the luggage left on board; and, having omitted to take proper care of it, were liable for loss arising from their negligence, not including merchandise and specie shipped in fraud of the contract.

[Per Turnbull, J., (dissentiente): That, the form of passenger ticket put in before the Magistrate being in terms not applicable to any contract between the parties, could not be received as evidence of any such contract. That, as the plaintiffs could not read English, they were not bound by conditions printed on the ticket which were not explained to them. That, the plaintiffs having paid an additional sum for a passage between decks, there was a parole novation of any original contract for a deck passage which had the effect of bringing the parties under the common law of Natal.]

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(Per Turnbull, J., dissentiente: Where goods were not landed until 16 days after arrival, although the whole cargo should have been discharged in 8 days at the most, the goods having been kept on board for 4 days in order to "tilt" the ship for repairs, this may be regarded as unreasonable delay entitling consignee to abandon and sue for the value of the goods, within the rule laid down in Hess's case (vide supra) there being some evidence consistent with the theory that the goods had deteriorated in value.]

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;	The presiding officer at an election is not privileged as to giving evidence at an election petition trial in respect of occurrences at the election.
Ì	Where an election had been declared null and void by reason of a mistake on the part of the polling officer, there being no misconduct by either party, each party ordered to bear his own costs of the election petition proceedings. The Weenen County Election Petition
	—(2). Law 16, 1883. Ballot Law, 1886. Irregularities in election proceedings. Marks on Ballot Paper. Identification of Voter. Invalid Votes. Legislative Council. Charter of 1856. Disqualification of Member. Subject of Foreign State. The Naturalization Act, 1870 (33 and 34 Vic., cap. 14).
i 1	Election and proceedings connected therewith declared to be null and void and seats declared to be vacant, on

the ground of the marking of ballot-papers with the written electoral numbers of the voters, and of other irregularities in the proceedings, being a non-compliance with essential principles of the Ballot Law and affecting the result of

the election,

A natural-born British subject had continuously, except in certain brief periods, resided in the Orange Free State since 1867, had twice been enrolled as a Justice of the Peace after taking an oath of allegiance to that State, and had exercised therein the rights and been subject to the obligations of a Burgher.

Held: That such person having voluntarily become naturalised in a foreign State had, after the passing of the Imperial Naturalization Act, 1870, ceased to be a British subject; and, not having been naturalised in Natal, was an alien in this Colony within the meaning of the term in sec. 12 of the Charter of 1856, and was thus ineligible as a member of the Natal Legislative Council. Further, that if it were conceded that he had been duly elected, his seat had become variant in terms of sec. 18 of that Charter.

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- EVIDENCE (1). Contract of sale. Parol evidence. See Auctioneer (1)
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C. and others, in their capacity as a School Committee, sued S. for possession of school premises and furniture. A jury found for defendant and judgment followed accordingly, with costs. S. issued execution for his costs. The Sheriff's return did not show that property of the committee had been levied upon. There was evidence of the existence of such property.

HELD, in these circumstances, that an application for leave to issue execution against the individual property of the plaintiffs should be refused.

QUERE: Whether such an application could be decided upon motion?

WRAGG, J., dubitante, whether, even upon an action, the order of the presiding Judge in a jury case as to costs could be so varied. Schulze v. Cato Ridge School Committee

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In re Ford

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-(2). Postnuptial contract. Partition of estate by agreement between spouses. Gift-Power to make and revoke. An agreement between spouses (executed after a postnuptial contract removing community of goods from the date of execution) purported to value the joint estate and to apportion one-half to each of the spouses. The husband, having transferred certain property to the wife in terms of the agreement, sued in a Circuit Court for cancellation of the transfer, on the ground that it had been made for no consideration and under a mistake in law as to what was actually claimable by the wife. He also claimed to have revoked any gift of the property. The learned judge found that the plaintiff was entitled to succeed, both on equitable and legal grounds, and gave judgment accordingly. Held, on appeal, that the judgment should be affirmed. Per Gallwey, C.J.: A postnuptial contract executed by spouses under sec. 7, Law 22, 1863, declaring that from and after the date thereof there should be no community of property between the spouses, does not preclude the parties from deciding the conditions as to division of property upon which community was intended to be dissolved. In the absence of any agreement at the time, the question of what is a fair division of property is one proper for judicial decision. Per TURNBULL, J.: Such postnuptial contract vests the property of the spouses in the husband. In such circumstances, the husband may lawfully bestow a gift upon his wife, not, however, binding as against creditors Doran v. Doran

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-(3). Assistance of Husband in passing Bond. "Public Trader." Judicial separation. Husband's business continued by wife. Rights of Creditors.

A married woman trading alone may be sued on a notarial bond, passed in respect of the liabilities of such business, without the assistance of her husband. A married woman may be regarded as a "public trader" to the extent of her public dealings alone, and to be so regarded it is not necessary that she should so trade generally.

Where a married woman, judicially separated from her husband and trading alone, had given a notarial bond to a creditor for the balance due on an account for goods supplied to her by the creditor during two years since such separation, HELD: That no deduction could be made for a balance of debt due to the bond-holder taken over by the wife, at the time of the separation, from her husband's business continued by her, as the account with the creditor was a running one, and such balance of debt had been absorbed by payments made at various times by the wife to the creditor.

Drury v. Daly

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HUSBAND AND WIFE (4). Antenuptial Contract. Income of property specified in Marriage Settlement. Construction of Covenants.

A marriage settlement, after the usual covenants of an antenuptial contract removing community of goods and of profit and loss and creating separate estates, provided (sec. 7) that the husband should, "during the existence of the said intended marriage, have the sole and exclusive administration of all the property, estate and effects of his said intended consort, notwithstanding anything herein contained to the contrary, for the purpose of the support of the said intended marriage, for which purpose he may at all times appropriate the income and profits thereof," but not to the extent of any mortgaging or selling. The deed proceeded to appoint trustees, and provided further (sec. 9) that in consideration of the marriage the wife agreed "to transfer and make over to the said trustees or trustee, upon trust for the ends, uses, and purposes aftermentioned," certain five lots "upon trust that they shall pay and allow to the said [wife] the free life rent of the said properties and the rents, income and profits thereof during her lifetime," after deducting the trustee's expenses and remuneration. The settlement then provided (sec. 10) for the sale of the lots, by consent of the spouses, and appropriation of the proceeds, and for the events of the death of the spouses with provision for the children if any.

HELD: That the provisions of sec. 9 of the settlement required the trustees to pay to the wife the free life-rent of the property therein specified and the rents, income and profit thereof during her lifetime, subject to the stipulated deductions.

Order accordingly, without prejudice to the rights of the trustees of the husband's insolvent estate. Trustees' costs and those of the wife to be paid out of the estate.

In re Malcolm

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HYPOTHEC (1) Landlord's. Goods on premises of Auctioneer. See Landlord and Tenant (1)

INDIAN IMMIGRANT (1) "Absence without leave" of indentured immigrant. Sections 30 and 31 of the "Indian Immigration Law, 1891." Powers of Protector, Assistant Protector, and Magistrates.

- 1. An indentured Indian immigrant having come to the Protector of Immigrant's Office in Durban to make a complaint against his employer, the Assistant Protector found the complaint to be vexatious and ordered the immigrant to return to his master. The immigrant, however, remained in Durban, absenting himself from his employer's service which was in another magisterial division. Held: That, in these circumstances, the immigrant was rightly brought before the Magistrate of Durban, as "the nearest Magistrate," under secs. 30 and 31 of the "Indian Immigration Law, 1891," to be dealt with, as absent without leave, and not being free from arrest under the first proviso of sec. 30 of that law.
- 2. Neither the Protector of Immigrants nor a Magistrate has power, under the "Indian Immigration Law, 1891," to order an indentured Indian immigrant, who has made a complaint before him, to return to his employer's service, or to punish him for not returning.
- 3. The Assistant Protector of Immigrants is not empowered by the "Indian Immigration Law, 1891," to perform any of the duties imposed by secs. 30 and 31 of that law on the Protector of Immigrants.

Protector of Immigrants v. Ramasamy

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Indian Immigration Trust Beard (1). Preference for Coolie instalments and costs of obtaining judgment. Costs of the Indian Immigration Trust Beard, incurred in 1886 and 1887, in obtaining judgment for coolie instalments, declared to be preferent, the objection that the Beard, by failing to enforce payment at the time, and even after notice to press for the same had been given by the first mortgagee, had slept on its rights and so waived its preference—not being sustained by the Court

In re Assigned Estate of M. Chéron

41

INSOLVENCY (1). Debtor's petition. Absence of assets. Debtor's petition refused by the Court, on the ground of the absence of assets

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- (2). Debtor's petition. Liabilities in Schedule. Fine imposed by Magistrate and unpaid. Further hearing of debtor's petition ordered (GALLWEY, C.J., dissentiente) to stand over, for evidence of payment of a fine imposed in a Magistrate's Court, or for satisfactory evidence as to default in payment, such fine being included in the schedule of unsecured liabilities. In re Mauson
- (3). Release from sequestration. Estate released from sequestration, the insolvent being out of the Colony and his estate having been surrendered in 1867, upon the Master's certificate that all proving creditors had either consented

to the release or had had deposited for them the amount, with interest, of their respective claims. HELD: That the Court is not required by sec. 107 of the Insolvency Law to make "further enquiry" concerning creditors who have not proved debts or entered claims, unless on the face of the application, the Master's certificate, or connected papers, there appear something which is not bona fide, or which is so suspicious as to justify such "further enquiry," the rights of such non-proving creditors being specially protected by sec. 107, and not being in any way altered or affected by the release of the estate from sequestration. [Per GALLWEY, C.J., dissentiente: That, under the circumstances, before granting the release, evidence should be produced to the Court showing that there were no other creditors in existence who had neither proved debts nor entered claims against the estate In re Hollard

13

INSOLVENCY (4). Assigned estate. Account—objections to. Question of ownership of property. Objections to account, although showing prima facie grounds, not sustained, as being insufficient to justify a disturbance of the account, and as involving questions of ownership of property, the evidence as to which was conflicting. The objecting creditor accordingly left to proceed by action to establish his claim In re Assigned Estate of M. Chéron

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—(5). "Costs of Administration." "Presenting and prosecuting" debtor's petition. Contribution account (secs. 17 and 138 of the Insolvency Law, 1887). Sec. 17 of the Insolvency Law, 1887, provides that "the cost of presenting and prosecuting a debtor's or creditor's petition... shall be a first charge on any assets realised in the insolvent debtor's estate, and shall, after having been first taxed and allowed by the Master, be paid by the trustee as a portion of the costs of administration.... If the assets realised by the trustee in any insolvent estate are insufficient to meet the costs of administration, the creditors who have proved concurrent claims on the estate shall be personally liable for such costs in proportion to such claims."

Held: That the costs so provided for included the costs of renewed applications by the debtor on his petition for surrender, such renewed applications being rendered necessary by opposition to the petition, based on inaccurate schedules filed by the petitioner and subsequently amended by leave of the Court.

Held, therefore: That such costs, as taxed, should rightly be included in a contribution account filed by the trustee in terms of sec. 138 of the Insolvency Law, 1887. Costs, however, reserved

In re insolvent estate of J. A. Dodd

49

-(6). Proof of debts and voting by secured creditor. Resolution binding mortgage creditors. Realisation of immovable property. Law 47, 1887, secs. 107, 119, 120, Sched. 1, sec. 12, and Sched. 2, sec. 8.

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Resolutions, passed at a meeting of creditors, by the votes of two concurrent creditors for small amounts and of a fourth mortgagee in respect of a small balance due after deducting the value of the security, the effect of such resolutions being to grant a lease of the mortgaged property and to prevent its speedy realisation, Held, not to be competent as binding prior mortgagees, who had proved their claims, to a delay in realising the mortgaged immovable property of the estate. The resolutions, therefore, ordered to be set aside, so as to allow the trustee to deal with the mortgaged property.

Per Gallwey, C.J.: Section 107 of the Insolvency Law, 1887, must be read together with the provisions of secs. 119 and 120.

The effect of Schedule 1, sec. 12, and Schedule 2, sec. 8, of the Insolvency Law, 1887, discussed.

In re insolvent estate of A. C. McEwan

INSOLVENCY (7). Notice in Gazette of intention to present debtor's petition. Transfer of immovable property sold by debtor.

The notice, published in the Gazette in terms of sec. 7, Law 47, 1887, of an intended application upon a debtor's petition for the surrender of his estate, is not an act of insolvency, and will not prevent the transfer to the purchaser of immovable property sold by the debtor some years previously, as evidenced by receipt for transfer duty and power of attorney.

In re insolvent estate of H. C. Ballance

- —(8). Trustee's remuneration. Delay in filing accounts. Trustee's remuneration authorised, though disallowed by the Master on the ground of trustee's failure to file account within the time prescribed by Rule 1 (b) of 20 July, 1875. In re Insolvent estate of R. T. Haynes
- —(9). Creditors petition. Order for sequestration on a creditor's petition refused, the debtor being dead and there being no executor of his intestate estate. ... Goolam v. Bobbert
- —(10). Debtor's Petition. The averment in a debtor's petition that the petitioner has become insolvent "without fraud or dishonesty on his part" held to be material.

In re Dicker 122

—(11) Objections to election of trustee. Confirmation. Practice. Sec. 44 of Insolvency Law. When objections have been taken to the election of a trustee, it is necessary that they should be brought before the full Court. Should the objectors not appear, the Master will submit the papers to the Court.
In re Davies

—(12) Compulsory sequestration. Proof of debt due to petitioning creditor. At the hearing of a summons to show cause, upon a creditor's petition, further proof of debt due to the petitioning creditor, ordered by the Court to be adduced.
In re Dicker

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INSOLVENCY (13) Removal of trustee. Jurisdiction	n-Judge in Chambers.
Costs. An application, under se	c. 57 of the Insolvency
Law, for the removal of a trustee	in insolvency, is not a
matter proper to be decided by	a Judge in Chambers.
Order as to costs of such an appli	cation wrongly made in
Chambers.	In re Davies

n re Davies 167

—(14). Debtor's Petition. Presentation by Agent. Debtor's Petition accepted by the Court (TURNBULL, J., dissentiente), such petition being presented in the name of a person holding the absent debtors general power of attorney.
In re I. Temol

254

-(15). Debtor's Petition. Partnership Firm. Debtor's petition refused, it appearing to the Court that it was presented by one of the partners of a firm which had been dissolved some years prior to the date of the petition.
In re Temol and Miad

255

—(16). Debtor's Petition. Rights of Judgment Creditor. Smallness of deficiency.

Debtor's petition refused with costs, where it appeared to the Court that the debtor had lodged notice of intention to present his petition in order to evade execution of a judgment obtained by a vigilant creditor, and that after rejecting a doubtful claim and deducting assets the liabilities of the debtor were of small amount. In re Duncan

255

—(17). Proof of Debt. Valuation of security—Amendment. Alleged mistaken Estimate of Value (Insolvency Law 1887, secs. 119-121; Sched. 1, sec. 14; Sched. 2, secs. 10-14),

Application to amend valuation of security by a proving creditor refused (per Gallwey, C.J.), it appearing that 12 months having elapsed since the admission of the proof, the trustee had been allowed to deal with the security, and that there was nothing to show the nature of the mistake, the evidence on that point being conflicting; the proof also having been duly sworn to by the creditor himself and there being some doubt as to the bona fides of the alleged mistaken proof.

[Per Gallwey, C.J., Semble: That it was open to the creditor to move for an order upon the trustee to distribute the proceeds of the security up to the amount of the claim; and that (approving in re Dodds ex parte Vaughan, 25 Q.B.D., 529) the fact of the trustee having admitted a proof upon a wrong valuation did not preclude him from correcting the proof to its proper value.]

In re Insolvent Estate of Mamoojee Amod & Co. 279

Inspection of Documents (1). Practice. Inspection of documents, consisting of certain letters contained with others in a book, allowed, upon the latter being lodged with the Registrar, and the particular letters being specified and identified.

Evans v. Peters.

Insurance (1). Arbitration clause. Condition precedent or collateral. Pleading. Exceptions.	
A policy of fire insurance contained the following clause:—"If any difference shall arise with respect to any claim for loss or damage by fire (and no fraud suspected, and the company does not elect to rebuild, repair, reinstate, or replace same) such difference shall be submitted to arbitrators, indifferently chosen, whose award, or that of their umpire, shall be conclusive."	
Held (Turnbull, J., diss.): That this was not a condition precedent to any action brought by the insured against the company in respect of loss by fire, there being no condition in the policy as to the mode of ascertaining the amount of loss. [Scott v. Avery, 2 Jur., Pt. I., N.S., 815; and Davies v. The South British Insurance Co., 3 Juta., 416, distinguished]. Johnston & Moulton v. Commercial Union Assurance Co., Ld	56
Interdict (1) Pending action, Interdict refused, summons having been issued and served in an action. Naicker v. Naicker	120
—(2) Pending action. Plaintiff in action interdicted from alienating or otherwise dealing with land the subject matter of the action. Grandin v. Cato's Curators	132
—(3) Costs. See Costs (3)	138
—(4). Application to set aside. Purchase and Sale of Land. Act of Mandatory. Alleged Mistake.	
W.M. obtained an interdict against regis'ration of any cession or document alienating a certain piece of land, on the ground that it had already been sold to him by M., the holder of certificate of sale, and that the latter was endeavouring to cede his interest to a third party. Upon application by M. for removal of the interdict, on the ground that M.'s agent, in effecting a sale to W.M., had exceeded his authority, and that M had in fact sold the land to another person, Held: That in these circumstances, the Court could not, upon a motion, disturb the interdict, but that W.M. should be put upon terms to establish his rights. Mangena v. Mallandain	246
-(5). Application to set aside. Disputed facts.	
Interdict having been granted in respect of a sum of money in a bank, application to set aside refused, on the ground that, the evidence as to ownership being conflicting, it would be better to allow the money to remain in the bank.	
Randles Bro. & Hudson v. Standard Bank and others	253
JUDICIAL SALE (1). Place of sale. Practice. Subject to consent of parties, judicial sale of immovable property authorised to be held on the auctioneer's premises at Newcastle, the property being situated in that borough. Adley v. Halley	76

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JUBISDICTION (1) Judge in Chambers. Insolvency — Removal of Trustee. See Insolvency (13)	167
—(2). See Review (6)	169
 —(3). Appeal from Circuit Court to Supreme Court in crimimal cases. There is no appeal to the Supreme Court from the judg- ment of a Circuit Court in a criminal case. 	
• Vathagaree v. Clerk of the Poace, Durban	222
-(4). Voters' Lists. Charter of 1856.	
The Supreme Court has no jurisdiction to entertain an application for an order restoring names to a Voters' List, unless the applicants have first, under secs. 33 and 34 of the Charter of 1856, brought their objections to such List to be heard and determined by the Resident Magistrate of the County or Electoral District.	
Ex parte Janion	
-(5). Road Board. Rule to show cause. Judge in Chambers. SEMBLE: A petition under secs. 44 and 45, Law 36, 1888, for a rule to show cause, should be presented to the full Court, and not to a Judge in Chambers, although the latter may, under sec. 40, grant further time within which to appeal. Saner v. Inanda Road Board	
-(6). See Magistrate's Court (13)	233
- (7). Motion. Order of Judge at jury trial as to costs. Execution. See Execution (1)	235
-(8). License and Stamp Law (1885). Spoiled Stamps. Appeal from Distributor of Stamps. See License and Stamp Law, 1885 (1)	240
-(9). Civil Jurisdiction of Magistrate. Liquid and Illiquid Claims. Law 22, 1889, sec. 23. See Magistrate's Court (15)	
-(10). Judge in Chambers. Divorce. See Divorce (2)	283
JURY LAW (No. 10, 1871) (1). Defects in Jury Law, No. 10, 1871, commented upon. Reid v. Gilson	186
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LANDLORD AND TENANT (1) Hypothec for rent. Auctioneer. Goods on premises of. Goods consigned to an auctioneer, for sale by public auction, or otherwise, on account of the consignors, held not to be liable to the landlord's hypothec for rent, though remaining on the demised premises for so long a period as 18 months.	
Moller & Co. and Greatrex & Son v. Levy	118
LEGISLATIVE COUNCIL (1). Disqualification of Member. Charter of 1856. See Election Petition (2)	000

LICENSE AND STAMP LAW, 1885 (1). Spoiled Stamps. Jurisdiction.
Appeal from Distributor of Stamps.

The Supreme Court has no jurisdiction to entertain an application for an order on the Distributor of Stamps to refund the price of used stamps or to exchange new stamps for spoiled stamps, unless the procedure contemplated by sec. 31 of the License and Stamp Law, 1885, requiring proof to be given to the Distributor of Stamps, has first been followed. [Gallwey, C.J., dubitante whether in any case there should be an appeal from the Distributor of Stamps save as specially provided in the License and Stamp Law, 1885, sec. 32, and Law 20, 1885, sec. 3.]

In re New Heriot Gold Mining Co.

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LICENSING BOARD (1).

See Municipal Corporation (2)

44

LIQUOB, SUPPLY OF TO NATIVES (1). Magistrate's Court. Form of summons. Law 22, 1878, sec. 2, and Law 10, 1890, secs. 1, 2 and 5. A summons in a Magistrate's Court charged a licensed dealer and his barman with contravening the provisions of sec. 2 of Law 22, 1878, in that they, or one or other of them, did wrongfully and unlawfully sell, barter, or supply, or cause to be sold, &c., to a certain native (named), a certain bottle of rum or other spirituous or fermented liquor of an intoxicating nature. HELD: (TURNBULL, J., dissentiente): That the summons was good, it being sufficient to cite therein the 2nd section of Law 22, 1878, creating the offence, without also referring to section 2, Law 10, 1890, in which the punishment was specified, the two Laws, by section 5 of the latter enactment, having to be read and construed together as one Law. [Per Turnbull, J.: That the section of the Law imposing the penalty should be specified in the summons, as well as that creating the offence.]

Clerk of Peace, Pietermaritzburg, v. Peters & Lawrence

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—(2) "Hottentots and Griquas." (Law 14, 1888.) "Bastard Hottentot." A coloured person, described as a "Bastard Hottentot," whose parents and grand-parents were both of mixed race, but one of whose great-grand-parents on either side was believed to have been Dutch, and who stated that he "had joined Adam Kok and become a Griqua," Hfld, to be neither a "Hottentot" nor a "Griqua," nor to come within the definition of a "Native" given in Law 14, 1888, sec. 1, in respect of an alleged contravention of Law 22, 1878, prohibiting the sale of spirits, &c., to persons of the Native race. [Per Gallwey, C.J. (dissentiente): The person in question came within the terms "Hottentot" and "Griqua" in Law 14, 1888, sec. 1].

Downes v. Clerk of Peace, Alfred County

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LIQUOB, DEALER IN (1) Licensed premises. Keeping open for sale during prohibited hours. (Ord. 9, 1847, sec. 24.) Sec. 24, Ordinance 9, 1847, enacts "that no retail dealer shall sell, or keep any tap, canteen, or public-house open for the sale of" the

	liquors referred to in hours. A billiard-room canteen, but with a sen from the bar by a wood fastenings on the inside with a counter, betwee hibited hours, the billia up and play going or barman (who was also I The main or front ent did not appear that liq the door or sliding win Held: In these circ had been rightly convifor the sale of liquor,	a, under the same rarate outer entranten partition, with of the bar, and a en the two rooms ord-room was found, several persons, billiard-marker) because of the bar was uror had in fact beed dow was actually our stances, that the cted for keeping of within the meaning outer than the meaning of the same of the bar was actually our stances, that the cted for keeping of within the meaning of the same o	oof as a license ce, was divide a door havin sliding window. During prod to be lighted in the room as closed, and in sold, nor that pen. Ilicensed deale the his premise ing of the sain o	d d g g,,,,-) l- ee i. it tt
_	section.	Cole v. Clerk of	•	
LOCAL BOARD	(1), Recovery of Arr ship (1)	ear Township Rat	es. See Town	ı- 267
Lungsickness	(1). Damages-Measu	re of.		
	Defendant's cattle, wrongfully came into c caused the latter to be	ontact with plain		
	Held: That the lia sive with that in cases and that the defendant so infected and dying ensuing in the ordinar reason of the interming	of fraudulent mi was liable for the of the disease, th y and natural cou- ling of the cattle.	srepresentation value of cattliss is being damagnee of events b	ı, le re y
	HELD, however, that reason of the plaintiff cows and making but for reduced profits on mote and could not be	being prevented fr ter, for loss of sale sales actually ma	om milking h	is d
MAGISTRATE (l). Liability of for wro	ngful acts of police	·•	
•	Per Gallwey, C.J. wrongful acts of police	: The liability of a	Magistrate fo	
	[But, for the opinion legal question of the M ments reported in 12 N	agistrate's liability	, see the judg	g-
Magistrate's	Court (1). Sale of Lice	uor to Native. Fo		
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-(8) Review. Judgment founded on wrong law. See Review (5)	151
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—(10). Contempt. Law 25, 1890, sec. 18. The proviso at the end of sec. 18, Law 25, 1890, reserving the right of an accused person to be tried upon summons, refers to the offence of wilfully disobeying a lawful judgment or order of the Court, and not to the contempts of Court described in the earlier part of the section. Chinian v. R.M., Durban	169
—(11). Claim in reconvention. Dismissal of summons. Practice. Review—Costs. Dismissal of summons in convention does not dispose of	
claim in reconvention. Where a Magistrate, after hearing evidence in the action, had dismissed the summons without costs, declining to hear defendant's claim in reconvention—on review, this judgment corrected into an absolution of defendant from instance with costs, and the Magistrate directed to hear claim in reconvention: plaintiff to pay costs of re-	
view. Watson v. Woodhouse	218
-(12). Criminal Procedure. Private prosecution. Consent. See Criminal Procedure (1)	220
—(13). Jurisdiction. Question of right of way. "Rights in future." (Law 22, 1889, sec. 21). An action involving a disputed right of way is beyond	
a Magistrate's jurisdiction, as binding rights in future. (Law 22, 1889, sec. 21). Kruger v. Horner	233
-(14). Criminal Procedure. Preparatory Examination. See Criminal Procedure (3)	247
-(15). Jurisdiction. Illiquid and Liquid Claims. Law 22, 1889, sec. 23. Under sec. 23, Law 22, 1889, it is competent to sue by one summons in respect of a claim upon a liquid document and a claim for goods sold and delivered, etc., to the extent, in each case, of the jurisdiction conferred by sub. secs. (a) and (b) of that section. Drury v. Daly	257
—(16). Security for Judgment and Costs on Appeal. Rule 35. Rule 35 of Inferior Courts of Justice is ultra vires, in so far as it requires an appellant to find security for the judgment and costs in the case appealed from.	
Zwakalapi v. Jardine	266

MINOR (1) Custody of. Claims of Parents, Conflicting evidence.

Access. Upon application for removal of an interdict restraining the father of a minor child from interfering with his wife and child, it appearing to the Court that the child had for four years past been properly cared for and educated by his mother, without deciding on conflicting evidence adduced, the Court ordered that the child should remain in his mother's custody, pending further proceedings, the father, however, to have reasonable access to the child.

In re Dempsey

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-(2) Property of, occupied by father of. Mortgage for father's business. Leave to mortgage property of minor for the purpose of erecting additional buildings thereon, necessary for a hotel business carried on in the premises by the minor's father. The latter being an uncertificated insolvent, certain precautions, recommended by the Master, adopted by the Court.
In re Fisher

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—(3) Unauthorised sale of property of. Terms of sanction by the Court. Transfer to purchaser of minor's land, sold by father without authority from the Court, authorised, but only upon payment to the Master of the whole purchase price of the land and improvements, for investment in the usual way on behalf of the minor. In re Saunders

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MUNICIPAL CORPORATION (1). Rates. Valuation of immovable property. The valuation of rateable property within a Borough required to be made by the Town Council, in terms of sec. 107, Law 19, 1872, for the purposes of assessment, is a valuation, by competent valuers, of the actual freehold value, at the time, of such property. Such assessment should not be disturbed by a valuation, made on behalf of the owner, wholly on the basis of the annual rental derived from the property. [Per Wracg, J., dissentiente: The Magistrate, hearing an appeal from the Borough valuation, acted reasonably in adopting the basis of the capitalised annual rental, for the purpose of ascertaining the freehold value of the property].

Corporation of Pietermaritzburg v. Owen

1

—(2). Town Council sitting as Licensing Board. Retail liquor license. Granting of license refused to same applicant at a prior meeting.

The mere refusal by a town council sitting as a licensing board, at a prior meeting, to grant an application for a retail liquor license, without any grounds being stated for such refusal, does not preclude the board from granting such a license to the same applicant at a subsequent meeting.

The proceedings of a town council, sitting as a licensing board, are to be in accordance with the provisions of sec. 10, Ordinance 9, 1847, the town council being substituted for the magistrate as the licensing authority.

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A retail liquor license granted on the 31st December of
one year for the whole of the following year, held to have
been rightly granted, notwithstanding the provisions of
a licensing regulation, made by the town council, to the effect that a license granted in any month other than
November, should be only "for the unexpired portion of that year.

SEMBLE: A municipal by-law or regulation having the effect of restricting the meetings of the licensing board to a single meeting in each year, would, so far, be ultra vires, not being authorised by the Municipal Corporations Law, and being repugnant to the provisions of Ordinance 9, 1847, secs. 8-10.

Madore and another v. Durban Corporation

MUNICIPAL CORPORATION (3). Judicial sale. Right of Corporation to buy in as mortgagee.

The power of a Town Council to accept mortgage bonds for the purchase price of Municipal lands invests the Corporation with the usual powers of a Mortgagee, including that of buying back such lands so mortgaged when sold under judicial process.

Corporation of P.M.Burg v. Wade

-(4) By-Laws-Prosecutor for contraventions.

Section 74, Law 19, 1872, empowers the Superintendent of Pelice of any Borough, or other person appointed by the Council, at his own instance, and without obtaining permission or certificate from the Attorney-General, to procecute in the Resident Magistrate's Court in the Borough for all contraventions of the Borough By-Laws. Held: That it was not necessary for the Superintendent of Police to have or produce any deputation or authority from the Council for the purpose of such prosecution.

Superintendent of Police v. Kattenburg

NATIVE (1) Supply of Liquor to. See Liquor, supply of to Native (1) ... 15

(2) Definition of. Liquor Laws. See Liquor, supply of to Natives (2)

(3). Exemption from Native Law. Evidence required by Court.

The Court will not hear a review where the appellant, a native claiming to be exempted from Native Law, had been sued in the Court below by an unexempted native, in the absence of the proof of exemption required by sec. 17, Law 28, 1865. Case accordingly remitted to the Magistrate for hearing de novo upon the requisite proof of exemption.

The Magistrate ordered to attach a copy of the letters of exemption (if any) to the record. Zwakalapi v. Jardine

NATURALIZATION (1). Disqualification of Member of Legislative Council.

Charter of 1856. Subject of Foreign State. The Naturalization Act, 1870 (33 and 34 Vic., c. 14). See Election Petition (2)

PARTHERSHIP (1). Surrender of Estate of firm already dissolved. See

Insolvency (15)

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Meek v. Colonial Government

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7	PLEADING (1). Settlement of issues. Jury trial. Practice. Plaintiff's declaration claimed a perpetual injunction to restrain the Government from proceeding with certain waterworks on his property. The plea questioned plaintiff's title, and averred that the conditions of the grant from the Crown justified the action of the Government upon the property. It was also pleaded that what was done had been done with plaintiff's leave, and that no injury had been occasioned. The case was set down for trial before a jury. Held, on an application by defendants, for an order under sec. 3 of the Rules of Court of January 31st, 1860, specifying the issues between the parties (WRAGG, J., preferring to express no opinion, on the ground that he was the Judge who would hear the case with the jury), that the issues were such as could properly be put to the jury by the judge presiding at the trial, and that the application should therefore be refused, without prejudice to the discretion of the presiding judge
87	(2). Exceptions. Will. Extrinsic evidence. See Will (3)
-	(3). Exceptions. Insurance. Arbitration Clause.
56	See Insurance (1)
135	(4) Exceptions. Issues of fact. Damages. Upon exceptions raised to defendant's plea in an action against the Colonial Government for damages in connection with railway construction, it appearing to the Court that it would be inconvenient to decide at so early a stage and without hearing evidence, upon the important issues raised in the pleadings, involving questions of damages, it was ordered that the case should proceed to trial. Meek v. Colonial Government
232	(5). Amendment. See Divorce (1)
	PLEDGE (1). Following. "Ordinary course of business." Set-off— mutual credits and debits. Costs, where plaintiff partly successful. A. & Co. supplied goods to H. and took from him in part payment sundry plough-fittings, belonging to his stock-in- trade. H.'s stock-in-trade was under bond to M., such bond prohibiting disposal of the security save in the usual course of business. M. sued A. & Co. for return of the plough-fittings or their value. HELD: That as the surrounding circumstances showed that the transaction was one in the ordinary course of busi- ness, the action failed, and that the defendants were entitled, as a set-off, to the value of the goods supplied by A. & Co. to H., but that, as the value of the goods so supplied exceeded that of the plough-fittings, judgment should be given for the plaintiff for the amount of such excess.

Under these circumstances, as the plaintiffs had substantially failed in their action, each party ordered to

bear his own costs.

McCubbin v, Archibald & Co.

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Phincipal and Agent (1). Money entrusted for speculation in shares. Mutual reticence and mora. Bona fides of principal. G. entrusted to L., a member of a firm of brokers, a sum of £40 for speculation in the share market. L. purchased shares in the D. Company, but did not duly acquaint G. with what he had done, neither did the latter ask for information on that point. The shares became worthless, and G. sued L. for £40, claiming that no scrip had been handed to him, although frequently demanded. The Magistrate gave judgment for £17, the value of the shares at a time when he considered that plaintiff should have been informed of the fact of the shares having been purchased for him. Held, on appeal, inasmuch as the evidence showed that there had been a mutual reticence, amounting to mora, on both sides, and especially as L. appeared to have acted in good faith, dealing with the shares as though they had been his own, there being no obligation upon him to realise the shares—that the Magistrate's judgment was wrong and should be turned into a	
judgment for defendant Langston v. Goodwill	18
-(2). Alleged mistake of Mandatory. Purchase and Sale of Land. Interdict. See Interdict (4)	246
-(3). Presentation of Debtor's Petition in insolvency by Agent. See Insolvency (14)	254
PRINCIPAL AND SURETY (1). Communications between creditor and surety as to debtor's position. If a creditor be specially communicated with, he is bound to make a full and honest communication of every circumstance within his knowledge calculated to influence the discretion of the surety entering into the required obligation. But he is under no obligation to disclose, voluntarily and without being asked to do so, circumstances unconnected with the particular transaction in which the surety is about to engage, or to inform the surety of any matter affecting the general credit of the debtor. If the intended surety desire to know any particular matter of which the debtor may be informed, he must make it the subject of distinct enquiry.	
Hosking v. Standard Bank	174
PRIVY COUNCIL APPEAL (1). Costs. See Costs (6)	228
—(2). Time for presenting petition. See Appeal (4)	230
PROTECTOR OF IMMIGRANTS (1), See Indian Immigrant (1)	108
PROVISIONAL SENTENCE (1) Defence. Payment. Authority of Agent to receive debt. Costs. Provisional judgment on a mortgage bond refused, it appearing that the interest, for	

in trust for a minor, unless such application be supported by affidavits showing prima facie grounds for the order

sought to be obtained.

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In re Saunders

The Court will not exercise its powers of review in the case of an appeal from the judgment of a Magistrate in a criminal case, where the appellant has undergone his sen-

tence of imprisonment.

In re De Gunzberg

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ROAD BOARD	(1). Rule to show ca bers. Practice—who ing road.			_		
	SEMBLE: A petitic 1888, for a rule to sh full Court, and not to latter may, under swhich to appeal.	ow cause, o o a Judge i	should be in Chambe	presented ters, althoug	n the	
	Petitioner heard fi Holley v. Umgeni Roc v. Pellew, 11 N.L.R.,	ud Board,				
	A Road Board, c power to open a road exist.			•	•	
	Where it appears after full considerat exercised a sound dis applied for, the Cour of the Board.	ion and cretion as t will be s	personal to the nec low to dis	inspection, essity for a	has road	225
Service (1).	See Summons (1)					218
SHIP (1). Se	e Carrier (1)	•••	•••	•••		78
Summons (Ser	vice) (1). Evidence of	f identity	of defend	ant.		
	A summons for a served upon defenda affidavit of service docess "on the said A. ing to her the origins by leaving with her at this was insufficient, personally unknown evidence that the personal of the pers	nt, in Lor eclared that C., of [the all al summons a true copy the defe to the soli	ndon, by a at he had address fol s with not y thereof. ndant bei icitor, and l was the c	solicitor, v served the lowed] by s ice attaches "HELD: ng, appare there beir	whose pro- show- d and That ently, ng no n the	218
Succession (1	c). Presumption of d case of a person who and 80 years of age; his family and others America about 50 ye had been made, but v record of death.	, if survive who was to have ars since, i	ing, would believed died unm t appearincess, to o	be between by members arried in State and that enquestions.	en 70 ers of South uiries fficial	74
—(2)	Life-interest. Omissi Intestacy. A testa without issue, beque estate "for her own her natural life or h remarriage, the will "become the propert and the will proceed in the bank.] HELD by virtue of the comme	tor, marri athed to h use and be er widowh directed t y of "—— with a dev : That un nunity, wa	ed in connis wife the enefit" du cood. Up that the period is to the der this was entitled	nmunity, one whole of ring the term on her deal or operty all ere was a buffer of multiple with the with half the	lying f his rm of th or hould lank, honey idow, joint	

life interest, derante viduitate, in the testator's half-share of the property so devised. That in the absence of any indication in the will of who was to inherit, there was an intestacy as to the ultimate inheritance to the property, and that therefore, upon the widow's death or remarriage, the estate would be distributed ab intestato. Drew v. Drew v.

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Succession (3) Deferred inheritance. Time of vesting. A testator, being a natural born British subject, married in England, by his will, executed under Ordinance 1, 1856, devised his estate to an executor and executrix upon trust for his wife, during her life or widowhood, to receive the income for the maintenance of herself and the testator's children. In the event of a second marriage, then upon trust to let or sell the property, the interest or rent to be paid, as to one-third, to the wife for her own use and benefit, and as to two-thirds, to be applied to the maintenance, &c., of the children. After the decease of the wife, upon trust to sell the property and to divide the proceeds between the children in equal shares, to be paid to them on attaining 21 years. HELD: That although there was no gift to the children but a direction to divide in the event of the widow's death, the vesting in the children took effect from the testator's death and was transmissable to the legal representatives of the children, though not payable until the death of the widow. Drew v. Drew

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Surerr (1). Communications between creditor and surety as to debtor's position. See Principal and Surety (1).

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SYNDICATE (1). Winding-up. "Company," within the meaning of sec. 1 of the Winding-up Law of 1866.

A Syndicate, e tablished for the purposes of acquiring mining property with a view to developing the same and disposing thereof at a profit by the formation of a Company; managed by a committee of 5 of its members vested with "full control of all the affairs of the syndicate" save as limited by express resolution of the members, three to form a quorum; having also an agreement of association signed by the members; a capital divided into shares, transferable with the approval of the Committee, but not divisible; with a share register, an office, a bank appointed for its funds, baying a secretary; and rules as to meeting and voting; the liability of members being limited to the balance unpaid upon shares. HELD (GALLWEY, C.J., dissentiente) not to be a "Company" within the meaning of the definition in sec. 1 of the Winding-up Law of 1866. An application for an order for winding-up the affairs of the syndicate, therefore, refused.

Per WRAGG, J.: That the decision in the *British Reef* Company (8 N.L.R., 151 and 157), was not conclusively affected by this judgment.

			P.	AGE.
faile disp disti the the	er TURNBULL, J.: That ed to carry out its species of its property an inguished it from the "decisions in Heyman v. British Reef G. M. Coved at.	cial object of develor d forming a future coexisting "Company of Brunskill (8 N.L.R.,	ping and ompany, on which 130) and	
deci " Co Com ting	er GALLWEY, C.J., dissessions in the last-cited company "proper for win mittee with all the powursteed from an ordinary scope of the Winding-up. In re The Dru	ases, such a syndical ading up, being mana ers of directors, and partnership, comin	te was a ged by a , as dis-	65
				-
Township (1). Ar		occupied lands in sati		
a pe occu ther Law	ne Supreme Court is uns stition from a Local B pied lands in satisfaction eon, there being no pr se, 1884, similar to that of the Municipal Corpor	oard for authority to n of arrear township; rovision in Law 11, t contained in secs.	sell un- rates due 1881, or	
		e The Ladysmith Loc	al Board	2 67
ame as tr in th	olication for amendmen nd a deed of transfer, b ansferee, refused, it app to Registrar of Deeds' O existing deed.	y substituting anoth- cearing that the decl ffice were in accordan	er name arations	187
a cer sum be p heirs ted pay estat the l a ***	tain farm to three of hi of One Thousand Five I aid by them into the aid by them into the lands to one of the th Two Hundred and Fi te." HELD: per GALLW bequest being charged waluable consideration 1883, schedule 1, sec. (efore pass to the heirs fr	s children, jointly " Hundred Pounds ste setate on behalf of t d the homestead and ree sons "for which fty Pounds sterling ver, C.J.: That the rith these payments within the meaning (d), and that transfe ee of duty.	for the rling, to the joint cultiva- he shall into the fact of was not of Law er could	123
	ement. Absence of mat poned on account of absence	ence of material with	BBF.	•••
		Grandin v. Cato's	Jurazors	132
TRUSTEE (1). Ant	enuptial settlement. R	esignation of trustee	and ap-	

pointment of new trustee. See Husband and Wife (1) ...

(2). Foreign trustee and executor testamentary. See Executor

(4)

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exception should be disallowed.

brought in Natal.

HELD, further: That the action had been rightly

Barnes and others v. McFie and another

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WILL (4) C	onstru	ction.	See Succ	ession (2)	and (3)	•••	•••	123
(5)	Sale o	of land	not autho	rised by	testator.	Minors' int	erests.	
	Sec	e Execu	tor (13)				•••	140
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. –(2) See	Compa	any (3)		•••	•••		112
-(3) A p	pointm	ent of Off	icial Man	ager. Sec	e Company	(4)	116
(•		Manager.	Purchas	e of assets		•••	224
		•	ry Lianide	ution Se				244

Ex. Gniss

ADMISSIONS.

ATTORNEY.

Norman Albert Douglas Yonge, Nov		3
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CANDIDATE ATTORNEYS.

PERCY ERSKINE TULLOCH DRIVER,		•••	Nov. 3.
THACKERAY JAMES ALLISON,			Nov. 30
GEORGE LOVAT FRASER,	•••	•••	Nov. 30
VICTOR GEORGE WILLIAMS			Nov. 30.

ADVOCATES OF THE SUPREME COURT.

* denotes that a license to practice has been taken out during the current year.

Name.	Date of Admission.	REMARKS.
Samuel Walter Rowse	1858	R. M., Newcastle. Also Attorney.
John Francis Kellet Dillon	8 Mch, 1859	Barrister-at-Law. Assistant R.M., Durban. Also Attorney.
John William Turnbull	10 May, "	Barrister-at-Law. 2nd Puisne Judge, Natal.
Theophilus Shepstone	6 Sept, 1864	
Robert Isaac Finnemore	8 Jan., 1868	Collector of H. M. Customs, Natal.
Robert Richards	28 Jan., 1869	Formerly Candidate Advocate.
Walter Patrick Joseph Purcell	6 May, 1873	Barrister-at-Law.
James Walter Smith	22 July, 1875	Do.
Frank Ernest Colenso	23 Mch, 1877	Do.
John Cann (junior)	18 Sept, "	Formerly Candidate Advocate.
* Harry Escombe	20 Sept, "	Chairman, Natal Harbour Board. Also Attorney.
* Kenneth Howard Hathorn	2 Nov, "	Also Attorney.
* William Boase Morcom	1 Mch, 1878	Q.C. H. M. Attorney-General, Natal.
Achille Ernest Titren	1 Mch, 1880	R.M., Umlazi.
* Henry Bale	11 Jan., 1881	Also Attorney.
* William Douglas Wheelwright	31 May, "	-
William Broome	31 Mch, 1882	Master & Registrar, S.C.
Frank Campbell Dumat	1 Mch, 1883	Barrister-at-Law.

ADVOCATES OF THE SUPREME COURT (Continued).

NAME.	Date of Admission.	Remarks.
Albert Weir Baker	15 Mch, 1883	Also Attorney.
* William Edmund Pitcher	10 July, "	Do.
* Herbert Henry Janion	24 July, "	Do.
* R. Michael Knighton Chadwick	8 July, 1884	Do.
Henry Francis Fynn	3 Nov, "	R.M., Umsinga.
* Thomas Garlicke	19 Mch, 1888	5
* Thomas Fortescue Carter	30 Nov, "	Formerly Candidate Advocate.
Stephen Stranack	1 Mch, 1887	Town Clerk, P.M.Burg. Formerly Candidate Advocate.
* William Burne	26 May, "	Also Attorney.
* William J. Gallwey	3 Nov. "	
Henry Cooke Campbell	2 Nov, 1888	Colonial Auditor.
Emile Joseph Patrick McMaster	12 Nov, 1889	Barrister-at-Law.
* Alfred Duchesne Millar	9 Jan., 1890	Also Attorney.
* Henri Guillaume Boshoff	12 Mch, 1891	Do.
Basil Francis Newall Macrorie	26 May, "	
* Cecil Audley S. Yonge	7 July, .,	Formerly Candidate Advocate.
* Ralph Heathcote Tatham	1 Aug, "	
* Edward Hull Coldridge	8 Sept, 1892	Also Attorney.

ATTORNEYS OF THE SUPREME COURT.

‡ denotes that a license to practice has been taken out during the current year.

Name.		Date of Admission.	Remarks.
Henry Fuller		1858	
Samuel Walter Rowse		. ,	R. M. Newcastle.
William Hornby		,,	
John Francis Kellett Dillon	•••	8 Mch., 1859	Barrister-at-Law. Also Advocate. Assist. R.M., Durban.
John Philip Symons	•••	3 Jan., 1860	M.L C., Umvoti County
Ebenezer Buchanan		26 Jan., "	Town Treasurer, P.M.B.
Robert Frederick Crosse	•••	30 Sep., 1861	
Alfred Simons	•••	11 Mch., 1862	
Philip Augustus Crozier		31 Jan., 1866	
William Shuter	•••	31 May, "	,
‡ Harry Escombe		3 Sep., 1867	Chairman, Nat. Harbour Board. Also Advocate
David Dale Buchanan (Jun.)	14 Jan., 1868	
‡ John Parker Waller	•••	1 Sep., 1869	Clerk of the Peace Durban.
Mackenzie Harry Walker	•••	11 Jan., 1870	
William Taylor	•••	6 Sep., "	
‡ Kenneth Howard Hathorn	•••	28 Mch., 1871	Also Advocate.
James McLaurin	•••	25 July, "	R.M., Alexandra County
Henry Kinnard Bill	•••	25 Nov., 1873	
Joseph Taylor		14 Jan., 1874	
‡ Harry John Shuter	•••	19 Jan., "	Clerk of the Peace Newcastle and Dundee
William James Shuter	•••	19 Jan., ,,	

ATTORNEYS OF THE SUPREME COURT (Continued).

Name.	Date of Admission.	Remarks.	
‡ Henry Bale	11 Jan., 1875	M.L.C. for the Colony.	
John Foster Paglar	1 July, "	Also Advocate.	
Bartlett Little	2 Mch., 1876		
John McNeil	31 May, "		
Robert James Abraham	11 Sep., 1877		
John Aitchison Runciman	22 Jan., 1878		
Samuel Button	18 July, "		
Beverley Charles Clarence	23 July, "	Asst. Clerk of the Peace, &c., P. M. Burg.	
John Courtney C. Chadwick	19 Nov., "	R.M., Ixopo.	
‡ Edward Mackenzie Greene	19 Nov., "		
‡ Richard Francis Morcom	27 May, "	Clek of the Peace, P.M.B.	
Thomas Bristowe Young	16 Sep., 1879		
‡ Hasell Rodwell	. 23 Sep., "		
Albert Weir Baker	8 Jan., 1880	Also Advocate.	
William Wilson Paley	18 Mch., "		
‡ Richard Michael K. Chadwick	6 May, "	Also Advocate.	
Robert Clarence Visick	13 May, "	Sheriff of Natal.	
‡ William Burne	. 1 July, "	Also Advocate.	
‡ William Edmund Pitcher ·	1 July, "	Also Advocate.	
‡ Herbert Henry Janion	1 July, "	Also Advocate.	
‡ Alfred Duchesne Millar	31 July, "	Also Advocate.	
‡ Joseph James Field	18 Jan., 1881	Clerk of the Peace, Klip River.	
‡ Frederic Augustus Laughton	31 Jan., "		
Frederick William Forder	29 Nov., "		
‡ Arthur Weir Mason	29 Nov., "		
‡ G. A. de Roquefeuil Labistour	30 Nov., "		
‡ William Joseph R. Harvard	1 Mch., 1882		
‡ Joseph Hansmeyer	4 July, "		

ATTORNEYS OF THE SUPREME COURT (Continued).

Name.	Date of Admission.	Remarks,
‡ Walter Arthur Vanderplank	24 July, 1883	·
Ewart Jukes	31 July, "	
‡ Hugh Anderson	8 Sep., "	
‡ John Jacob Hugman	11 Sep., "	
‡ Frederic Travers Burges	20 Sep., "	
Robert Thomas F. Granger	8 Jan., 1884	
Henry Christian Kock	8 Jan., ,,	Legal Adviser, &c., to the Govt. of Zululand.
‡ George Edgcumbe Robinson, jr.	8 Jan., "	
‡ Alfred Lister	31 Jan., "	
John Peirson	· · · · · · · · · · · · · · · · · · ·	
‡ Henry Guillaume Boshoff	• • • • • • • • • • • • • • • • • • • •	Also Advocate.
Arthur Henry Downard	• • • • • • • • • • • • • • • • • • • •	
‡ Robert Henry Christison	1 July, "	
Walter Slater	8 J uly, "	
Theodore Edmund Tarte	29 Nov., "	
William Thomas Hyde Frost	13 Jan., 1885	
‡ Conrad Bernard Cooke	31 Jan., "	
‡ Charles Tatham	31 Jan., "	Clerk of the Peace, Umvoti.
‡ Raynsford Leyland Whittaker	10 Mch., "	
# Francis Oliver F. Churchill	24 Mch., "	
William Young Campbell	31 Mch., "	
‡ Percy Binns	31 Mch., ,,	•
‡ John Christopher Palmer	31 Mch., "	
‡ Thomas Watt	21 May, ,,	
‡ Albert Alexander Smith	26 May, "	
‡ George Herbert Hullett	26 Sep., "	
William Louch	26 Nov., "	
‡ George Edward Francis		
Robert Delabere Blaine	, ,,	
‡ Arnold Worthington Cooper	25 Mch., "	

ATTORNEYS OF THE SUPREME COURT (Continued).

Name.	Date of Admission.	Renarks.
‡ Clifford Walmsley Barlee Scot	t 31 May, 1886	
‡ Robert Charles A. Samuelson	31 May, "	
Frederick Spence Tatham .	13 July, "	
John Frederick Jackson .	31 July, "	
Gillespie Mason	16 Sep., "	
Harry John Filmer .	8 Jan., 1887	
‡ Edmund Howard Langston .	1 Mch., "	
Alfred George Marcel Forder	23 Jul y , "	
‡ Percy Evans Coakes .	1 Sep., ,,	
‡ John Biddlecombe Holgate .	6 Sep., "	
Arthur Octavius Bayly .	3 Nov., ,,	
Frederick Lester Thring .	22 Nov., "	
Charles William Povali .	10 Jan., 1888	
John Livingston	31 Jan., "	
‡ George Murray Burne .	31 Jan., "	
Frederick Pearse	31 May, "	
Henry J. Price	31 July, "	
Arthur Edward Winder .	30 Nov., "	
‡ William Abraham Bester .	29 Jan., 1889	
Thomas Blaikie	13 Mch., "	
Francis Edwin Ellis .	26 Mch., "	
. 10. 1. 17	28 Mch., "	
	30 Mch., ,,	•
‡ Edward Hull Coldridge .	23 May, "	Also Advocate.
T 0 777 11	8 June, "	
Harry David John Runciman	3 Sep., "	
‡ John Dunheved Lister	3 Sep., "	
John Furzer Drummond Ellie	ot 12 Nov., "	
‡ Edward Lucas	20 Mch., 1890	
Andrew Maitland Turnbull	31 May, "	
‡ Joseph Henry Nicolson	1 July, ,,	
-	• . ,,	

Name.	Date of Admission.	Remarks.
‡ Charles O'Meara	1 July, 1890	
‡ Charles Beviss	29 July, "	
‡ Arthur William S. Beningfield	1 Sep., "	
John Fraser	31 Jan.: 1891	
‡ William MacGillivray Cameron	2 Mch., "	
‡ Thomas Mackillican	24 Mch., "	
† Harry Herbert P. Waller	1 May, ,.	
Arthur Sidney Lester	1 May, "	
‡ Herbert Stephenson	2 June, "	
‡ James Anderson	24 July, "	
‡ Thomas Henry Brokensha	3 Sep., ,,	
‡ David Mann Calder	10 Sep., "	
‡ C. A. de Roquefeuil Labistour	3 Nov., "	
Theodore Hellet	9 Jan., 1892	
‡ Ernest Watkin Farman	30 Jan., "	
‡ John Moore Cooke	10 Mch., "	
‡ Edward James Pithey	31 Mch., "	
Thomas Gutridge	3 May , "	
Arthur Edward Foss	31 May, "	
† Charles Montagu Etheridge	1 July, "	
Herbert Murray	29 July, "	
Herbert William Wilkes	2 Sep., "	
‡ Edmund William Pitcher	2 Sep., "	
Alexander Robert Peirson	2 Sep., "	
Humphry Evans K. Anderson	8 Sep., "	
‡ Robert Lewis Hitchins	8 Sep., "	
Alexander James McGibbon	20 Sep., "	
Duncan Thomson	20 Sep., "	
Norman Albert Douglas Yonge	3 Nov., "	

Ex. 5/1/1/3

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RULE OF COURT.

Supreme Court, Natal, Judges' Chambers, 20th January, 1892.

IT IS ORDERED BY THE COURT AS FOLLOWS:-

THAT the Clerk, and where there is more than one Clerk, the First Clerk of the Magistrates' Courts for Weenen, Klip River, Newcastle, and Verulam Districts respectively, shall be the Assistant Registrars of the Circuit Courts held in their respective Districts, and in the absence of the Registrar of the Circuit Court holden in any of those Districts, shall act for such Registrar as occasion may require.

(Signed) M. H. GALLWEY.

(") WALTER WRAGG.

(") J. W. TURNBULL.

A true copy,

W. Brooms,

Registrar Supreme Court.

RULE OF COURT.

Judges Chambers, Supreme Court, Natal, 8th July, 1892.

It is ordered by the Court as follows:-

- (1). That the sum of money to be deposited with the Registrar by the party making application for a Jury in a Civil Case, under Law 10, 1871, shall be Ten Pounds, in lieu of the sum of Two Pounds, Eight Shillings, provided by Sections 1 and 3 of the Rules of Court, dated the 6th December, 1871.
- (2). That the said 1st and 3rd Sections of the said Rules of the 6th December, 1871, be, and the same are hereby amended accordingly.
- (3). That the 4th Section of the said Rules of the 6th December, 1871, is hereby repealed, and in lieu thereof it is ordered as follows:—

If the trial shall last more than one day of the Courts' sitting, the party having applied for the Jury shall, before the resuming of the trial, on the second and each succeeding day thereof, deposit with the Registrar such sum of money, to be ascertained by the Registrar, as shall be required under Law 4, 1892, for payment of the Jurors impannelled for the trial of the cause, in respect of each such day after the first day.

(S	igne	ed)	M. H. GALLWEY.
(,,)	WALTER WRAGG.
(••)	J. W. TURNBULL.

